IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

STATE OF IOWA, ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, Plaintiff, vs. NATIONAL INDIAN GAMING COMMISSION; PHILIP N. HOGEN, in his official capacity as Chair of the National Indian Gaming Commission; CLOYCE V. CHONEY, in his official capacity as Vice-Chair of the National Indian Gaming Commission; and NORMAN H. DESROSIERS, in his official capacity as Commissioner of the National Indian Gaming Commission, Defendants.	CASE NO. 08-328 **COMPLAINT**

COMES NOW the Plaintiff State of Iowa and files this Complaint against the above-named defendants, stating in support as follows:

NATURE OF CASE

1. This is a challenge to a final decision of the National Indian Gaming Commission ("NIGC") approving an amended gaming ordinance submitted by the Ponca Tribe of Nebraska that purported to identify lands located in Carter Lake, Iowa as "Indian lands" eligible for tribal gaming. Section 2719 of the Indian Gaming Regulatory Act ("IGRA") generally prohibits gaming on Indian lands acquired after the Act's date of enactment, October 17, 1988, unless

certain exceptions apply. In the decision at issue, the NIGC determined that the Carter Lake Parcel qualified as "restored lands" under the exception codified at 25 U.S.C. § 2719(1)(B)(iii).

2. That decision was wrong as a matter of law. Indeed, it was contrary to the NIGC's own initial decision and to the opinion of the NIGC's own Associate General Counsel, both of which concluded that the Carter Lake Parcel does not qualify as "restored lands" under IGRA. The Solicitor of the Department of the Interior also concurred in the NIGC's initial decision that the Carter Lake Parcel did not qualify as "restored lands."

3. The NIGC's final decision also expressly ignored the Tribe's own agreement with the State of Iowa that the Carter Lake Parcel was not "restored lands" under IGRA. In 2002, the State of Iowa agreed to forego judicial review of the Department of the Interior's decision to take the Carter Lake Parcel into trust for the Tribe's benefit in exchange for the Tribe's public admission and acknowledgment that the Carter Lake Parcel was not "restored lands" under IGRA. That admission was not only drafted and agreed to by the Tribe, it was included in the Notice that the Department of the Interior's Bureau of Indian Affairs ("BIA") published announcing its intent to take the Carter Lake Parcel into trust.

4. Four years later, when the Tribe dishonored its prior assurance and sought the right to conduct gaming operations on the Carter Lake Parcel as "restored lands," the NIGC's Associate General Counsel recommended rejection of the Tribe's request, the NIGC refused it, and the Solicitor of the Department of the Interior concurred. Then, in the media dark of New Year's Eve 2007, the NIGC reversed all that. Although the NIGC proclaimed itself "troubled by the inequities worked in this case" and even accused the Ponca Tribe of leading the State of Iowa "down the primrose path with promises it never intended to keep," the NIGC ruled in its

December 31, 2007 decision that the Carter Lake Parcel was "restored lands" after all, and refused to "grant[ ] either a remedy to the State or impos[e] a consequence on the Tribe."

5. Because the NIGC erroneously decided that the Carter Lake Parcel qualifies under the "restored lands" exception of IGRA and exceeded its authority in so ruling, the State of Iowa seeks a Declaratory Judgment and other appropriate relief.

PARTIES

6. Plaintiff State of Iowa ("Iowa") is a sovereign state of the United States of America within whose borders the Carter Lake Parcel is located. Plaintiff Thomas J. Miller brings this action in his official capacity as the Attorney General of Iowa.

7. Defendant National Indian Gaming Commission is an agency of the United States whose statutory duties include administering and enforcing certain provisions of the Indian Gaming Regulatory Act, 25 U.S.C.§ 2701, *et seq*. The NIGC is established within the United States Department of the Interior ("DOI"). See 25 U.S.C. § 2704(a).

8. Defendant Philip N. Hogen is the Chairman of the National Indian Gaming Commission and is sued in his official capacity.

9. Defendant Cloyce V. Choney was the Vice-Commissioner of the National Indian Gaming Commission and is sued in his official capacity. Defendant Choney resigned from the NIGC effective December 31, 2007.[1]

10. Norman H. DesRosiers is a Commissioner of the National Indian Gaming Commission and is sued in his official capacity.

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[1] Because he is sued in his official capacity as a public official, Defendant Choney's successor as NIGC Vice-Commissioner should be substituted upon appointment. See Fed. R. Civ. P. 25(d)(1).

JURISDICTION AND VENUE

11. The Court has jurisdiction over Iowa's claims pursuant to 28 U.S.C. § 1331 as this civil action arises under the Constitution, laws, and/or treaties of the United States.

12. The Court has jurisdiction pursuant to 5 U.S.C. §§ 701-706 to conduct judicial review of final agency action taken by the National Indian Gaming Commission.

13. The State of Iowa seeks declaratory and other appropriate relief from the Court pursuant to 28 U.S.C. §§ 2201 and 2202 for the purpose of determining a question of actual controversy between the parties as set forth herein.

14. Venue is appropriate in the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 1391(e)(2)-(3) and 5 U.S.C. § 703.

FACTUAL ALLEGATIONS

15. Federal supervision of the Ponca Tribe of Nebraska ("Tribe") was terminated by act of Congress on September 5, 1962. See 25 U.S.C. § 971 *et seq.*

16. On October 31, 1990, Congress restored the Tribe's federal recognition. See 25 U.S.C. § 983 *et seq.* (Ponca Restoration Act).

17. On or about September 24, 1999, the Tribe purchased in fee the Carter Lake Parcel which consists of approximately 4.8 acres of land in Carter Lake, Iowa.

18. On or about January 10, 2000, the Tribe passed a resolution seeking to have the DOI's Bureau of Indian Affairs place the Carter Lake Parcel into trust for the Tribe's benefit. This resolution provided that the Parcel should be taken into trust for the primary purpose of providing health services to tribal members and to provide for central government functions in Pottawattamie County, Iowa.

19. On or about September 15, 2000, the BIA Great Plains Regional Director issued notice of BIA's preliminary decision agreeing to accept the Carter Lake Parcel into trust for the Tribe's benefit.

20. The State of Iowa and Pottawattomie County brought an appeal before the DOI's Interior Board of Indian Appeals ("IBIA") challenging the BIA's decision to accept the Carter Lake Parcel into trust, in part on the basis that the BIA failed to take into consideration the Tribe's true intent to utilize the Carter Lake Parcel for gaming purposes. See Iowa v. Great Plains Regional Director, 38 IBIA 42, 52 (2002).

21. On August 7, 2002, the IBIA affirmed the decision, holding that the Carter Lake Parcel "was purchased . . . and is currently used for health care facilities" and that any suggestion the Tribe intended to use the property for gaming purposes was "nothing other than pure speculation . . . ." Iowa v. Great Plains Regional Director, 38 IBIA at 52.

22. The State of Iowa and the Tribe, through its legal counsel, subsequently reached an agreement in which Iowa agreed to forego judicial review of the IBIA's decision to accept the Carter Lake Parcel into trust and the Tribe expressly acknowledged that none of the exceptions delineated in 25 U.S.C. § 2719(b)(1)(B) to IGRA's prohibition against gaming on Indian lands acquired in trust after October 17, 1988 were applicable to the Carter Lake Parcel.

23. The BIA published in the December 6, 2002 edition of the *Council Bluffs Nonpareil* a corrected public notice ("Corrected Notice") stating its intent to accept the Carter Lake Parcel into trust that included the following language:

> As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the two part determination under 25 U.S.C. sec. 2719. In making it's [sic] request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. sec. 2719(b)(1)(B). There may be

> no gaming or gaming-related activities on the land unless and until approval under the October 2001 checklist for gaming acquisitions, gaming-related acquisitions and two-part determinations under section 20 of the Indian Gaming Regulatory Act has been obtained. (emphasis added).

24. The above-quoted statement that appeared in the Corrected Notice was submitted to the BIA by the Tribe's legal counsel, Michael Mason. No public retraction or amendment of this notice has ever been published by the Tribe, the BIA or the State of Iowa.

25. The BIA consented to and published the text of the Corrected Notice, including the above-quoted passage, with knowledge and in furtherance of Iowa's agreement with the Tribe to forego judicial review of the IBIA's August 7, 2002 ruling.

26. Acting in reliance on the Tribe's acknowledgment that the Carter Lake Parcel was "not eligible for the exceptions under 25 U.S.C. sec. 2719(b)(1)(B)" published in the Corrected Notice, the State of Iowa waived seeking judicial review of the IBIA's August 7, 2002 appeal ruling.

27. On January 28, 2003, the Tribe executed a warranty deed conveying the Carter Lake Parcel to the United States of America in trust for the benefit of the Tribe.

28. The Acting Regional Director of the BIA's Great Plains Region, in a memorandum dated February 10, 2003, accepted the deed conveying the Carter Lake Parcel in trust to the United States of America.

29. In the fall of 2005, the Tribe sought an "Indian lands" determination from the NIGC that the Carter Lake Parcel was gaming eligible under IGRA as "restored lands."

30. In February 2006, the Tribe submitted to the NIGC a proposed amendment to its gaming ordinance pursuant to 25 U.S.C. § 2710. The Tribe's proposed amendment sought to

make the ordinance site specific by identifying the Carter Lake Parcel as "Indian lands" eligible for gaming under IGRA.

31. In response to an invitation from the NIGC's Office of General Counsel, the State of Iowa submitted written responses to the NIGC on April 21, 2006 and July 19, 2006, opposing the Tribe's request that the NIGC determine that the Carter Lake Parcel qualified as "restored lands" (and were thus eligible for gaming) under IGRA.

32. In August 2006, the Tribe withdrew its request to amend its gaming ordinance from the NIGC's consideration. As a consequence, the NIGC deferred rendering an opinion at that time as to whether the Carter Lake Parcel qualified as "restored lands" under IGRA.

33. On July 23, 2007, the Tribe resubmitted its application for an "Indian lands" determination to the NIGC as part of a renewed request to approve the Tribe's amended gaming ordinance pursuant to 25 U.S.C. § 2710.

34. The State of Iowa, again upon invitation from the NIGC's Office of General Counsel, submitted a written response to the NIGC on August 31, 2007, opposing the Tribe's renewed request that NIGC determine that the Carter Lake Parcel is gaming-eligible "restored lands" under IGRA.

35. In a memorandum dated October 22, 2007 to Defendant Hogen, NIGC Associate General Counsel Michael Gross recommended that the amendment to the Tribe's gaming ordinance be disapproved because the Carter Lake Parcel did not qualify as gaming-eligible "restored lands" under IGRA. A true copy of Associate General Counsel Gross' October 22, 2007 memorandum is attached to this complaint as Exhibit 1.

36. Consistent with the terms of a Memorandum of Agreement between the NIGC and the DOI, the DOI Office of the Solicitor reviewed and concurred in the analysis of Associate General Counsel Gross' October 22, 2007 memorandum.

37. In a letter dated October 22, 2007, NIGC Chairman Hogen issued his decision holding that the Carter Lake Parcel does not qualify for IGRA's "restored lands" exception and disapproved the amendment to the Tribe's gaming ordinance. Chairman Hogen's October 22, 2007 decision expressly incorporated the above-referenced memorandum by Associate General Counsel Gross. A true copy of Chairman Hogen's October 22, 2007 letter is attached to this complaint as Exhibit 2.

38. On November 9, 2007, the Tribe filed an appeal pursuant to 25 C.F.R. § 524.1 of Chairman Hogen's October 22, 2007 disapproval of the Tribe's proposed amended gaming ordinance. The Tribe did not serve a copy of its appeal upon the State of Iowa.

39. On November 16, 2007, Chairman Hogen and the Tribe filed a "Joint Motion for Expedited Decision" in which they requested that the NIGC issue a final decision on the Tribe's appeal within 35 days or, at a minimum, prior to the December 31, 2007 anticipated resignation of Defendant Choney from the NIGC.

40. Iowa learned of the Tribe's appeal when it received a letter from the NIGC dated November 19, 2007, inviting Iowa to participate in the Tribe's appeal of the disapproval of the Tribe's amended gaming ordinance as a "limited participant." The NIGC's letter instructed Iowa to file a written submission pursuant to 25 C.F.R. § 524.2 on or before November 29, 2007.

41. In a filing dated November 29, 2007, the State of Iowa requested permission pursuant to 25 C.F.R. § 524.2 to participate in the Tribe's appeal and submitted a written response in support of Chairman Hogen's October 22, 2007 decision.

42. In an order dated November 30, 2007, the NIGC granted Iowa's request to participate in the Tribe's appeal as a "limited participant."

43. On December 31, 2007, the NIGC issued its ruling reversing the Chairman's earlier decision and holding that the Carter Lake Parcel was gaming-eligible "restored lands" under IGRA. A true copy of the NIGC's December 31, 2007 decision is attached to this complaint as Exhibit 3.

44. The NIGC did not obtain the concurrence or agreement of the DOI prior to issuing its December 31, 2007 decision.

45. The NIGC was established by, and under the terms of, IGRA, and has only the powers Congress granted it under the Act.

46. As reflected in a letter dated June 13, 2008 from the Solicitor of the Department of the Interior to Chairman Hogen, the scope of the NIGC's powers under IGRA does not encompass independent authority to render "Indian lands" decisions. A true copy of Solicitor Bernhardt's June 13, 2008 letter is attached to this complaint as Exhibit 4. The NIGC has no authority under IGRA to independently issue "Indian lands" determinations absent the assent of DOI.

47. On May 22, 2008, DOI's Bureau of Indian Affairs published in the Federal Register final administrative rules articulating standards and procedures that the DOI will follow in interpreting and applying the exceptions to the prohibition of gaming on Indian lands acquired after October 17, 1988 contained in 25 U.S.C. § 2719, including the "restored lands" exception. See 73 Fed. Reg. 29,354 (2008) (to be codified at 43 C.F.R. pt. 292); 73 Fed. Reg. 35,579 (2008) (amending effective date to August 25, 2008).

48. Prior to the promulgation of 43 C.F.R. Part 292, neither the DOI nor the NIGC had promulgated any administrative rules defining the scope and applicability of IGRA's restored lands exception or establishing the agencies' roles and procedures to be used in making a restored lands determination under IGRA.

49. If the NIGC's December 31, 2007 decision is allowed to stand, the State of Iowa will be subject to provisions of IGRA that require the State to negotiate in good faith a tribal-state compact and submit to tribal gaming on the Carter Lake Parcel.

50. The State of Iowa is injured by the NIGC's December 31, 2007 decision because, inter alia, the decision interferes with the State's sovereign right and authority to make and enforce its own gaming policies, including policies concerning the location, development, and conduct of gaming enterprises within the State. Iowa also invokes its *parens patriae* authority to protect the interests of its citizens who are or will be injured by the NIGC's decision authorizing gaming on the Carter Lake Parcel.

COUNT I

Violation of the Administrative Procedure Act By Defendants' Approval of the Ponca Amended Gaming Ordinance in Violation of IGRA

51. The State of Iowa reasserts and incorporates the allegations stated in Paragraphs 1 through 50 as if fully set out herein.

52. The NIGC's December 31, 2007 decision approving the Tribe's amended gaming ordinance constitutes final agency action and is subject to judicial review pursuant to the Administrative Procedure Act. See 5 U.S.C. § 704; 25 U.S.C. § 2714; 25 C.F.R. § 524.3.

53. The State of Iowa has exhausted all available administrative remedies to challenge the NIGC's December 31, 2007 decision.

54. The NIGC's December 31, 2007 decision to approve the Tribe's site specific gaming ordinance was contrary to law because the Carter Lake Parcel does not qualify under IGRA as Indian lands eligible to be used for gaming purposes.

55. In rendering its December 31, 2007 decision that the Carter Lake Parcel was gaming-eligible "restored lands" under IGRA, the NIGC unreasonably and arbitrarily failed to consider all relevant facts and circumstances known to it including, but not limited to: the Tribe's representations as to its intended use of the Carter Lake Parcel at the time of trust acquisition; the Tribe's acknowledgement and admission that the Carter Lake Parcel did not qualify for any of the exceptions under section 2719(b)(1)(B); the terms of the settlement agreement between the State of Iowa and the Tribe; and the BIA's review and acceptance of the settlement agreement between the State of Iowa and the Tribe.

56. In rendering its December 31, 2007 decision that the Carter Lake Parcel was "restored lands" under IGRA, the NIGC failed to consistently apply and interpret applicable agency rules, precedent, policies, procedures, and inter-agency memoranda of agreement.

57. There is an actual justiciable controversy between the parties as to whether the NIGC correctly determined in its December 31, 2007 decision that the Carter Lake Parcel qualifies as gaming-eligible "restored lands" under IGRA.

58. Defendants' December 31, 2007 decision that the Carter Lake Parcel was gaming-eligible "restored lands" under IGRA was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and without observance of procedure required by law.

COUNT II

Violation of the Administrative Procedure Act By Defendants' Issuance of a "Restored Lands" Decision Without Authority in Violation of IGRA

59. The State of Iowa reasserts and incorporates the allegations stated in Paragraphs 1 through 58 as if fully set out herein.

60. The NIGC acted in excess of its authority by issuing an Indian lands determination concurrent with its consideration and approval of the Ponca Tribe's site-specific gaming ordinance because only the United States Secretary of the Interior, not the NIGC, has the legal authority to determine issues concerning Indian lands and tribal jurisdiction.

61. There is an actual justiciable controversy between the parties as to whether the NIGC lawfully exercised its delegated powers in issuing its December 31, 2007 decision that the Carter Lake Parcel qualifies as "restored lands" under IGRA.

62. Defendants' independent action in issuing a "restored lands" decision without the concurrence of and approval by the Secretary of the Department of the Interior was beyond the powers of the Defendants, and was thus arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and without observance of procedure required by law.

PRAYER FOR RELIEF

The State of Iowa respectfully requests the following relief:

a) A declaratory judgment pursuant to 28 U.S.C. § 2201, *et seq.*, that the Carter Lake Parcel does not qualify as "restored lands" under 25 U.S.C. § 2719(b)(1)(B)(iii);

b) A declaratory judgment pursuant to 28 U.S.C. § 2201, *et seq.*, vacating and setting aside as unlawful the NIGC's December 31, 2007 decision approving the Tribe's amended gaming ordinance because the NIGC's findings and conclusions are:

   i. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A);

ii. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, 5 U.S.C. § 706(2)(C); and/or

iii. without observance of procedure required by law, 5 U.S.C. § 706(2)(D).

c) Awarding the State of Iowa its costs and reasonable attorney fees to the extent permitted by law; and

d) Awarding the State of Iowa such other relief as the Court deems equitable and just.

Dated: August 22, 2008

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

MEMORANDUM

To: Chairman Hogen

From: Michael Gross, Associate General Counsel, General Law

Date: October 22, 2007

Re: Ponca Tribe of Nebraska, site-specific gaming ordinance

On July 23, 2007, the Ponca Tribe of Nebraska submitted an amended gaming ordinance for approval. The single amendment makes the ordinance site specific by defining as "Indian lands" a piece of land in Carter Lake, Iowa, taken into trust in February 2003. With the submission of its amended ordinance, the Tribe supplied a detailed submission contending that the Carter Lake land is restored lands within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).[1] The Office of General Counsel has reviewed in detail the Tribe's submission, as well as supplemental material supplied both by the Tribe and the State of Iowa. We conclude that though the Ponca Tribe of Nebraska is itself a "restored" tribe, the factual circumstances surrounding the acquisition of the Carter Lake land show that it was not taken into trust as part of the Tribe's restoration. Accordingly, the Carter Lake land is not "restored land." We therefore recommend that you disapprove the ordinance.

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[1] This is actually the Tribe's second such submission. The Tribe submitted the same site-specific ordinance in February 2006 but withdrew it in August 2006 in the face of an impending disapproval. You were recused from that determination because the Tribe was then represented by Faegre & Benson. The Tribe has retained Akin Gump to represent its interests in this submission.

EXHIBIT 1

THE LAND IN CARTER LAKE, IOWA

Carter Lake, Iowa, incorporated 1930, sits on 1,236 acres of land (approx.) in Pottawattamie County and is the only city in Iowa west of the Missouri River. (www.cityofcarterlake.com/history.html.) The city is surrounded almost completely by Omaha, Nebraska, and the river makes up its small southern boundary and separates it from Council Bluffs, Iowa. Carter Lake's peculiar location is best grasped visually. Figure 1 provides a map:

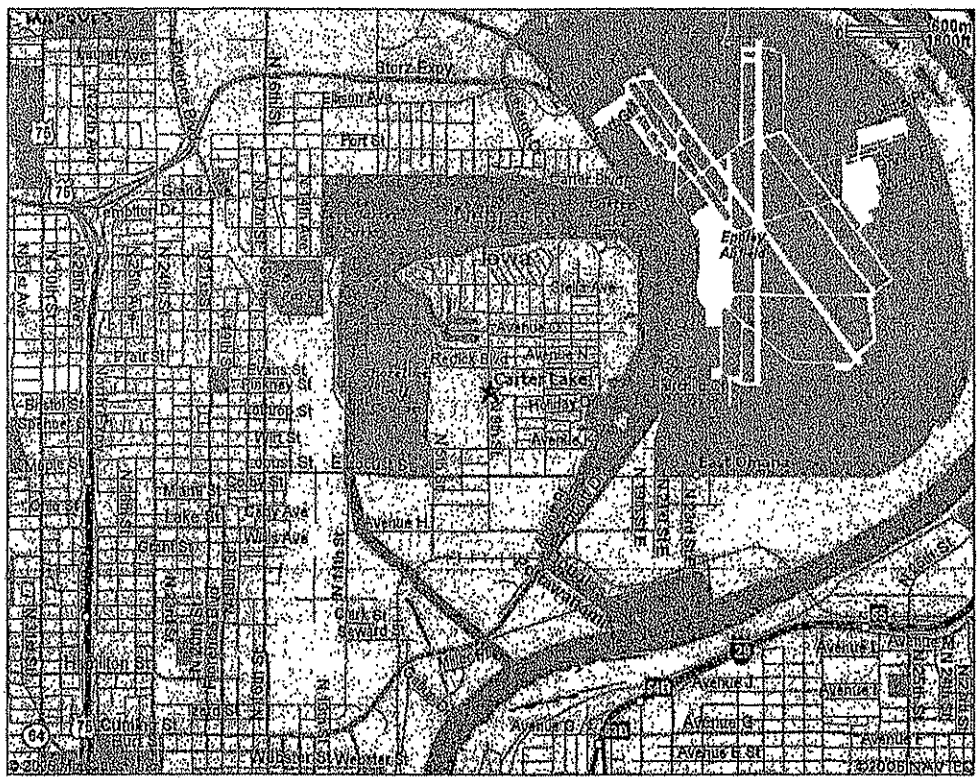


Figure 1: Carter Lake, Iowa. (Source: MapQuest Inc.)

Back before 1877, the Missouri River flowed around what is now the city and defined the border between Iowa and Nebraska. *Nebraska v. Iowa*, 143 U.S. 359, 370 (1892); *Nebraska v. Iowa*, 406 U.S. 117, 118 (1972). That year, however, the Missouri flooded and abandoned its ox-bow course for its present course, leaving the 323-acre

Carter Lake – then called Cut-Off Lake – to cradle the city's northern end. (*See, The History of Carter Lake, at* www.cityofcarterlake.com/history.html; Figure 1.)

With the change in the river's channel, the State of Nebraska claimed the land, arguing that the border between Nebraska and Iowa moved along with the river. The Supreme Court rejected the claim in 1892. Under well-settled riparian law, it held that when a river or stream marks the boundary of property, the boundary moves with the river when the river gradually changes its course through accretion. When, however, a river changes course by avulsion, when it "suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary;... the boundary remains as it was, in the center of the old channel, although no water may be flowing therein." *Nebraska v. Iowa*, 143 U.S. at 360; *Nebraska v. Iowa*, 406 U.S. at 118.

The 1877 flood, the Court found, changed the Missouri's course by avulsion, not accretion, and thus the boundary between the two states remained unchanged:

> [I]n 1877, the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel;... unless the waters of the river returned to their former bed, [such center line] became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

Nebraska v. Iowa, 143 U.S. at 370. The Court thus charged the two states to designate a boundary consistent with its opinion, which they did by compact, and Carter Lake remains in Iowa today. *Id.*; *Nebraska v. Iowa*, 406 U.S. at 118.

On September 24, 1999, the Ponca of Nebraska purchased in fee approximately 4.8 acres of land in Carter Lake, Iowa, commonly known as 1001 Avenue H, Carter Lake, Iowa. Its legal description is:

Parcel A-1 (West; Iowa Property)

A parcel of land being part of lots 20, 21, and 22, together with part of the abandoned railroad right-of-way located north of the existing Illinois Central spur track in said lots 21 and 22, all in the Auditor's subdivision of section 21, township 75, range 44, West of the 5th P.M., Pottawattamie County, Iowa, said parcel described as follows:

Beginning at the northwest corner of said lot 20; thence along the northerly line of said lot 20, north 88° 28' 27" east, 69.05 feet; thence south 00°18' 05" east, 228.93 feet; thence north 89° 36' 57" east, 224.92 feet; thence north 00° 30' 42" west, 230.45 feet to a point on the northerly line of said lot 22; thence along said northerly line and along said northerly extended easterly, north 89° 11' 28" east, 221.33 feet to a point on the easterly line of said abandoned railroad right-of-way; thence along said easterly line and said easterly line extended southerly, south 00° 48' 32" east, 579.95 feet to a point on the northerly right-of-way line of the Illinois Central Railroad; thence along said northerly right-of-way line the following six (6) courses:

(1) South 89° 09' 18" west, 220.09 feet;
(2) North 64° 27' 01" east, 12.10 feet;
(3) North 61° 31' 11" west, 126.58 feet;
(4) North 46° 53' 25" west, 102.08 feet;
(5) North 38° 46' 37" west, 146.92 feet;
(6) North 50° 47' 51" west, 38.80 feet to a point on the westerly line of said Lot 20; thence along said westerly line, north 01° 03' 32" west, 301.52 feet to the point of beginning.

Said parcel of land contains an area of 4.81 acres, more or less.

(Trustees deed, recorded at Book 100 Page 15532, Pottawattamie County, Iowa.)

Shortly thereafter, on January 10, 2000, the Tribe passed a resolution seeking to have the Bureau of Indian Affairs place the land into trust. The Tribe's stated intent was to place a healthcare facility on the land:

> WHEREAS: The property will be utilized to provide services to our tribal members, primarily health services. Those services consist of Indian Health Service 638 contracted programs and Bureau of Indian Affairs P.L. 93-638 contract programs....

(Ponca Tribe of Nebraska, resolution 00-01.)

district court, and the Tribe agreed that the land would be used for the provision of governmental services and not for gaming. (November 26, 2002, e-mail from Michael Mason, Esq.; December 13, 2002, letter from Jean M. Davis, Assistant Attorney General, to Michael Mason, Esq.) On December 6, 2002, the BIA published in newspapers of general circulation in the Carter Lake area a "corrected notice of intent to take land into trust." The language of that notice was provided by the Tribe's attorney, (November 24, 2002, e-mail), and stated:

> The Regional Director of the Great Plains, Bureau of Indian Affairs, United States Department of the Interior has made a final determination that the United States will accept: [formal description of the Carter Lake land], which is located in the City of Carter Lake, Iowa, in the name of the United States for the benefit of the Ponca Tribe of Nebraska. The United States shall acquire title no sooner than thirty days from December 6, 2002. This notice was published in accordance with Title 25, Code of Federal Regulations, Seciton 151.12(b)....
>
> THE TRUST ACQUISITION OF THE CARTER LAKE LANDS HAS BEEN NAMED FOR NON-GAMING RELATED PURPOSES, AS REQUIRES (sic) BY THE PONCA TRIBE AND DISCUSSED IN THE SEPTEMBER 15, 2000, DECISION UNDER THE REGIONAL DIRECTORS ANALYSIS OF 25 CFR 151.10(c). AS AN ACQUISITION OCCURRING AFTER OCTOBER 17, 1988, ANY GAMING OR GAMING-RELATED ACTIVITIES ON THE CARTER LAKE LANDS ARE SUBJECT TO THE TWO PART DETERMINATION UNDER 25 U.S.C. SEC. 2719. IN MAKING IT'S (sic) REQUEST TO HAVE THE CARTER LAKE LANDS TAKEN INTO TRUST, THE PONCA TRIBE HAS ACKNOWLEDGED THAT THE LANDS ARE NOT ELIGIBLE FOR THE EXCEPTIONS UNDER 25 U.S.C. SEC. 2719(b)(1)(B). THERE MAY BE NO GAMING OR GAMING-RELATED ACTIVITIES ON THE LAND UNLESS AND UNTIL APPROVAL UNDER THE OCTOBER 2001 CHECKLIST FOR GAMING ACQUISITIONS, GAMING-RELATED ACQUISITIONS AND TWO-PART DETERMINATIONS UNDER SECTION 20 OF THE INDIAN GAMING REGULATORY ACT HAS BEEN OBTAINED.

(December 6, 2002, corrected public notice. Emphasis in original.)

On January 28, 2003, following the publication of this corrected notice, the Tribe executed a deed conveying the Carter Lake land to the United States, and the BIA finished the acquisition in February 2003. (January 28, 2003, warranty deed; February 10, 2003, letter from Acting Regional Director, Great Plains Region, BIA, to Superintendent, Yankton Agency.)

The Carter Lake land is the land identified in the Ponca of Nebraska's amended gaming ordinance as "Indian lands," and it is the land where the Tribe now intends to offer gaming under the theory that the Carter Lake land is "restored land."

LEGAL ANALYSIS

I. Indian lands, generally.

IGRA permits gaming only on Indian lands, 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2), which it defines as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). The National Indian Gaming Commission's implementing regulations clarify:

> Indian lands means:
>
> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either --
>
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
>
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. It is the opinion of the Office of General Counsel that the Ponca of Nebraska's land in Carter Lake is "Indian lands" under these definitions. It is trust land over which the Tribe exercises governmental power, and thus it satisfies § 502.12(b)(1).

A. Trust land

The Carter Lake land is, without question, now trust land. Again, the Tribe purchased the land in fee in 1999, and the BIA finished its fee-to-trust acquisition in February 2003. (February 10, 2003, letter from Great Plains Acting Regional Director to Superintendent, Yankton Agency.)

B. Governmental Power

The Carter Lake land is also land over which the Ponca of Nebraska exercise governmental power. In order to exercise governmental power over land, a tribe, like any other government, must first have jurisdiction to do so. *See, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), *superseded by statute on other grounds as stated in Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) (in addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D. Kan. 2000), *aff'd and remanded, Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (a tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (a tribe must first have jurisdiction in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4)).

Tribes are presumed to have jurisdiction over their members and lands. Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *see also*, *United States v. Wheeler*, 435 U.S. 313, 323 (1978). There are no treaties or statutes applicable here that would limit the Tribe's jurisdiction.

Accordingly, when, as here, lands are held in trust for a tribe off-reservation, the analysis looks to whether the tribe is exercising governmental authority over the land. How exactly a tribe does this IGRA does not say, though there are many possible ways in many possible circumstances. For this reason, NIGC has not formulated a uniform definition of "exercise of governmental power," but rather decides that question in each case based upon all the circumstances. *National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

The courts provide useful guidance. The First Circuit found that exercising governmental power involves "the presence of concrete manifestations of ... authority." *Narragansett Indian Tribe*, 19 F.3d at 703. Examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.* Here, the Ponca of Nebraska exercise governmental authority over the Carter Lake land in a variety of concrete ways: through its constitution and legislation, through an inter-governmental jurisdictional agreement, and through the provision of governmental services to its members.

The tribal constitution extends the Tribe's governmental jurisdiction to all of its trust lands:

> The territorial jurisdiction of the Ponca Tribe of Nebraska under this Constitution shall extend to all trust or tribal lands as described by metes and bounds in the Treaties heretofore ratified by the Congress of the United States of America and shall cover all future additions that are within or without said boundary lines that may be acquired by the Ponca Tribe of Nebraska, or by the United States of America and held in trust for the Ponca Tribe of Nebraska or its members....

Ponca Tribe of Nebraska Constitution, Art I.

Similarly, the Ponca Law and Order Code establishes a tribal court and gives jurisdiction over all tribal lands, including trust land:

> The general jurisdiction of the Tribal Court ... shall be all territory of the Ponca Tribe of Nebraska, including ... those lands held in trust by the United States for the benefit of the Tribe and members of the Tribe....

Ponca Law and Order Code §§ 1-2-1, 1-4-1.

In April 2000, the tribe exercised this jurisdiction, entering into a government-to-government "Cooperation and Jurisdictional Agreement" with the city of Carter Lake. Among other things, the agreement gave the parties concurrent jurisdiction over civil actions arising on the land and involving tribal members, and it gave them concurrent criminal jurisdiction over offenses committed by tribal members or members of other Federally recognized Indian tribes. (Cooperation and Jurisdiction Agreement, § II, ¶¶ A1, B.) Further, the parties have joint powers of arrest on the land, and the Tribe agreed to provide law enforcement there. *Id.* at § II, ¶C; § III.

Beyond this, the Tribe was only partially successful in making healthcare available on the land. In 2000, at a cost of $161,000, the Tribe placed a small modular building and paved parking lot on the land. The building was used to house a staff of four to provide health and social services. For budget reasons, the Tribe discontinued these services within a few years, but it still maintains offices there.

These things taken together, then, are concrete manifestations of the Tribe's exercise of governmental authority in Carter Lake.

Indian Lands, generally: conclusion

Given the foregoing, the Ponca Tribe of Nebraska exercises governmental authority over its Carter Lake land; it has jurisdiction to exercise that authority; and the land is held in trust for the tribe by the United States. The Carter Lake land, in short, is "Indian land" within the meaning of IGRA. 25 U.S.C. § 2703(4)(B).

II. GAMING ON AFTER-ACQUIRED TRUST LAND

Meeting the definition of "Indian lands" does not finish the analysis, however. The United States took the Carter Lake land into trust in February 2003, and thus the land falls within IGRA's general prohibition against gaming on trust land acquired after October 17, 1988. 25 U.S.C. § 2719(a). The question thus becomes whether the Carter Lake land meets any of the exceptions in § 2719. The Tribe contends that the land is restored land under 25 U.S.C. § 2719(b)(1)(B)(iii). It is the opinion of the Office of General Counsel that it is not. Though the Ponca Tribe of Nebraska was itself restored to Federal recognition, the land was not restored to the Tribe as part of that restoration, and thus the land is not restored lands.

To meet this "restored lands" exception, a tribe must be an "Indian tribe that is restored to Federal recognition," and the acquisition of the land into trust must be part of a "restoration of lands" for the tribe. These terms are not defined in IGRA or the NIGC's implementing regulations, but there is precedent.

A. The Ponca Tribe of Nebraska was restored to Federal recognition

To be an "Indian tribe that is restored to Federal recognition," a tribe must demonstrate a period of recognition by the United States, a period of non-recognition, and reinstatement of recognition by the United States. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 369 F.3d 960, 967 (6th Cir. 2004). The Ponca of Nebraska satisfy all three conditions.

1. Recognition by the United States

The Ponca are culturally and linguistically related to the Osage, Kaw, Quapaw, and the Omaha, and together these tribes comprise the Dhegiha language group within the Siouan language family. Beth R. Ritter, *Piecing Together the Ponca Past: Reconstructing the Degiha Migrations to the Great Plains*, 22 GREAT PLAINS QUARTERLY, 271, 272 (2002); Elizabeth S. Grobsmith and Beth R. Ritter, *The Ponca Tribe of Nebraska: The Process of Restoration of a Federally Terminated Tribe*, HUMAN ORGANIZATION, Spring 1992, at 3. Together these tribes migrated from the east into the Great Plains and eventually separated. The Ponca and the Omaha, being the last to split, settled together near what is now Niobrara, Knox County, Nebraska. Accounts differ as to when that split occurred, some dating it as early as 1390 and others as late as 1715. Grobsmith and Ritter, *The Ponca Tribe*, at 3-4.

In any event, the first definitively Ponca villages in the Niobrara area date from about 1750. Ritter, *Piecing Together*, at 279. While most historic Ponca villages cluster in the Niobrara area, villages have been found as far south as the confluence of the Platte and Missouri Rivers south of Omaha in Nebraska; as far west in Nebraska as Cherry County, near the confluence of the Niobrara and Snake Rivers; as far north and west as Hughes County, South Dakota, east of Pierre; and as for north and east as Pipestone,

Minnesota. Ritter, *Piecing Together*, at 274; James H. Howard, *Known Village Sites of the Ponca*, PLAINS ANTHROPOLOGIST 15, NO. 48, 109-134 (1970). The range of the Ponca villages is best shown visually. Figure 2 provides a map:

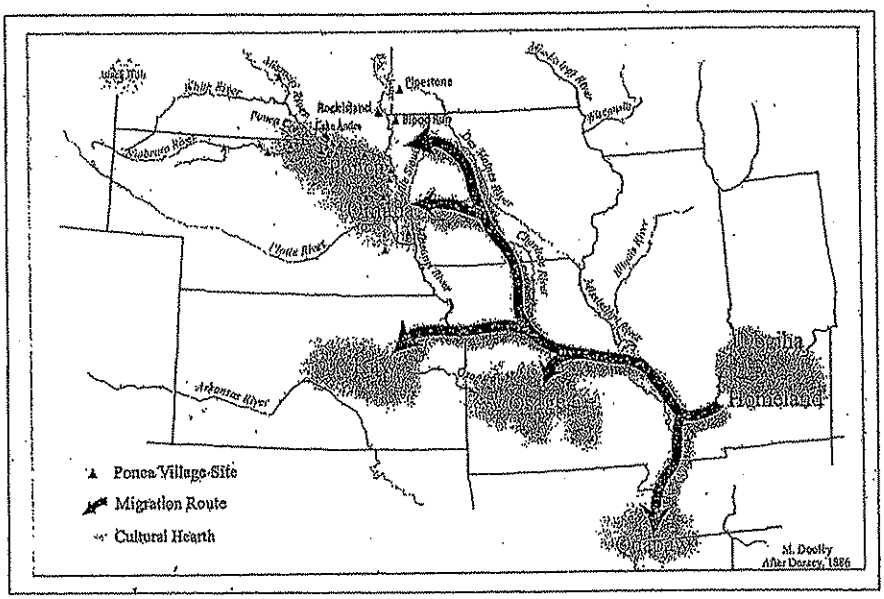


Figure 2: Ponca migration and village sites. (Reproduced from Ritter, ***Piecing Together the Ponca Past:***, 22 GREAT PLAINS QUARTERLY, 271, 274 (2002)

On June 25, 1817, following the War of 1812, the Ponca struck the first of four treaties with the United States. This first treaty forgave any prior injuries or acts of hostility that might have existed, renewed in perpetuity the friendly relations between the two nations that existed before the war, and placed the Ponca under the protection of the United States. 7 Stat. 155 (1817).

In June 1825, the nations struck a second treaty. This one again acknowledged the protection and supremacy of the United States, and it permitted the United States to regulate commerce with the Ponca, which was to be conducted exclusively with American citizens. 7 Stat. 247, Articles 1 - 4 (1825). This last was important, apparently, because the Ponca were active traders and had traded with both the French and the

Spanish back into the 18th Century. Each of those nations, at one time or another, tried to monopolize the Ponca trade. Ritter, *Piecing Together*, at 279.

The Ponca ceded no land in either the 1817 or the 1825 treaty. This changed, however, with the treaty of March 12, 1858. In that treaty, the Ponca ceded "all the lands now owned or claimed by them, wherever situate," except for a reservation that was, more or less, a 25-mile square between the Niobrara and Ponca Rivers. The Ponca agreed to relocate there within one year. In consideration for the land and for the Ponca relocation, the United States agreed to pay various annuities and to provide money, over various periods of years, for the Poncas' subsistence – to purchase stock and agricultural implements, break up and fence land, build houses, establish schools, build mills, etc. 12 Stat. 997, Articles I and II (1858).

On March 10, 1865, the third treaty was "supplemented" with a fourth, by which the Ponca ceded an additional 30,000 acres, and the United States returned burial grounds and corn fields, various portions of townships around old village sites, and islands in the Niobrara River. This resulted in a Ponca reservation of some 96,000 acres. 14 Stat. 675, Articles I and II (1865); Grobsmith and Ritter, *The Ponca Tribe*, at 5. These four treaties *per se* demonstrate recognition of the Ponca by the United States.

Before the modern era of Federal Indian law, one way the United States recognized the governmental status of Indian tribes was by negotiating and entering into treaties with them. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and

sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."); *United States v. Washington*, 898 F. Supp. 1453, 1458 n.7 (W.D. Wash. 1995), *aff'd in part, rev'd in part on other grounds*, 157 F.3d 630 (9th Cir. 1998) (treaty rights are "the result of the negotiation between two sovereigns, the United States and the Tribes."); *NIGC Karuk Lands Opinion* at 3 (Oct. 12, 2004) ("Based on the fact that the Tribe negotiated treaties with the United States it can clearly be stated that there existed a government-to-government relationship at one time").

As of 1865, then, the Ponca Tribe was recognized by the United States. Thereafter, however, the tribe split into the Ponca of Nebraska (or Northern Ponca) and the Ponca of Oklahoma (or Southern Ponca). The question thus arises whether the United States recognized the Ponca of Nebraska after the split, and the answer to that question is "yes."

The split was the culmination of a sequence of events that began in 1868, when the United States struck the Fort Laramie treaty with the Great Sioux Nation. 15 Stat. 635 (1868). Incredibly, the land that treaty set aside for the Sioux included all of the Ponca reservation. 15 Stat 635, Article II. This made the Ponca intruders in their own homes, and for eight years the more numerous and more powerful Sioux raided and attacked them. *Ponca Restoration Act etc. Hearing on S. 1747 et al. Before the Senate Select Committee on Indian Affairs*, 101st Congress, 2nd Sess. 221 (1990) (testimony of Dr. Elizabeth S. Grobsmith, professor, University of Nebraska, and sources cited therein). (Hereafter, "*Ponca Restoration Hearings.*") The United States' solution to the problem it created was to relocate the Ponca.

Congress appropriated money to do so in 1876, and in 1877, the government informed the Ponca chiefs that the tribe must relocate to the Indian Territory. Eight chiefs were selected to visit and select a new reservation, but when they went, they found the land inhospitable and asked to return home. The request was denied, but they returned anyway, journeying some 500 miles in 40 days. *Ponca Restoration Hearings* at 222.

After denying repeated requests by the Ponca to reverse its removal decision, and because the Ponca refused to go to the Indian Territory voluntarily, the government issued an order for removal on April 12, 1877. Removal began for some of the Ponca on April 30, 1877, and for others in May. The journey, known as the "Ponca Trail of Tears," was made without adequate provision or preparation and encountered horrible weather. Many died, and the Ponca arrived "discouraged, homesick and hopeless ... on the lands of strangers, in the middle of a hot summer, with no crops or prospects for any." *Ponca Restoration Hearings* 222-223.

In early 1879, Chief Standing Bear, whose son had died and had asked to be buried in the Ponca homeland, set out for Nebraska with 66 others. Having reached the Omaha Tribe's reservation that spring, Standing Bear and his company were arrested by General George Crook for the purpose of returning them to the Indian Territory. *United States ex. Rel. Standing Bear v. Crook*, 25 F. Cas. 695, 686 (D. Neb. 1879). With the support of many outraged citizens, including prominent attorneys and newspapermen, Standing Bear applied for a writ of habeas corpus. *Ponca Restoration Hearings*, 223-224. Finding for the first time that Indians were "persons" under American law, and finding no lawful grounds to relocate Standing Bear and his companions, District Court Judge Elmer S. Dundy ordered their freedom. *Standing Bear*, 25 F. Cas. at 700-701.

The treatment of the Ponca and Judge Dundy's decision received national attention. In 1880, a committee was appointed by the Senate to investigate, and it made a report to President Hayes in 1881 condemning the government's mismanagement of Ponca affairs. *Ponca Restoration Hearings*, 225-226.

In an Act of March 2, 1889, Congress made some reparation for giving the Ponca reservation to the Sioux Nation. It provided that Ponca members "now occupying a part of the old Ponca Reservation, within the limits of the said Great Sioux Reservation..." were to be allotted land there. 25 Stat. 892. Under this authority, 27,236 acres were allotted to 168 people. H. REP. No. 2076, *Providing for the Division of the Tribal Assets of the Ponca Tribe of Native Americans of Nebraska Among the Members of the Tribe*, 87th Cong., 2d Sess. at p. 15 (1962) ("H. Rep. 2076"); S. Rep. No. 1623, *Providing for the Division of the Tribal Assets of the Ponca Tribe of Native Americans of Nebraska Among the Members of the Tribe, and for Other Purposes*, 87th Cong., 2d Sess. at p. 14 (1962) ("S. Rep. 1623.") From this point forward, the Northern Ponca were established in Nebraska.

That the United States recognized the Ponca of Nebraska, as distinct from the Ponca of Oklahoma and the Ponca before 1868, is evident from the tribe's reorganization under the Indian Reorganization Act. In the modern era of Indian law, Federal recognition of an Indian tribe requires both a legal basis for recognition, *i.e.* Congressional or executive action, and some empirical indicia of recognition, namely, a "continuing political relationship with the group...." *Grand Traverse*, 369 F. 3d at 968, *quoting* Cohen, *Handbook of Federal Indian Law*, at 6 (1982); *Mashpee Tribe v. Sec'y of the Interior*, 820 F.2d 480, 484 (1st Cir. 1987). Both criteria are met here.

Among its various provisions, the Indian Reorganization Act of 1934 grants any Indian tribe the right to adopt a constitution, which must be done by majority vote at a

special election called for the purpose and which must then be approved by the Secretary of the Interior:

> Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when –
>
> (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
>
> (2) approved by the Secretary pursuant to subsection (d) of this section.

25 U.S.C. § 476(a). The Act likewise permits the Secretary to issue, upon petition, a charter of incorporation to a tribe. 25 U.S.C. § 477.

The IRA itself, in short, provides both a legal basis for the United States' recognition of an Indian tribe and a basis for a continuing political relationship with the tribe. Under the IRA, a tribe may adopt a constitution or corporate charter, or both, recognized by the United States, and the approval by the Secretary of the Interior is the beginning of Federal supervision of the tribe's legal affairs. Subsequent tribal elections under a tribal constitution, for example, are subject to Federal regulation. 25 C.F.R. §§ 81.1-81.24.

The Ponca of Nebraska approved a constitution and by-laws on February 29, 1936, and these were approved by the Secretary of the Interior five weeks later on April 3. H. Rep. 2076 at 11; S. Rep. 1623 at 11. A corporate charter for the Ponca Tribe of Native Americans of Nebraska was ratified on August 15, 1936. H. Rep. 2076 at 11; S. Rep. 1623 at 11. From 1936 forward, then, until termination in 1966, the United States recognized the Ponca of Nebraska.

2. Termination or non-recognition by the United States

The second condition for demonstrating that a tribe is restored to Federal recognition is the loss of prior recognition by the United States. Such a loss may occur through legislative action – *e.g.* by statute or treaty – or by administrative action. *Grand Traverse,* 369 F.3d at 968-72; *TOMAC v. Norton,* 193 F. Supp. 2d 182, 193-94 (D.D.C. 2002); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 705-07 (W.D. Mich. 1999), *vacated on other grounds*, 288 F.3d 910 (6th Cir. 2002). The Ponca of Nebraska lost Federal recognition forty years ago, after the passage of a termination act, 25 U.S.C. §§ 971 – 980.

During the mid-20th Century, the "Termination Era," Congress promoted an end to the trust relationship between the United States and the Indian tribes and aimed instead at assimilation:

> it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American citizenship.

H.C.R. 108, *Termination of Federal Supervision: The Removal of Restrictions Over Indian Property and Person*, 83rd Cong., 2nd Sess. (1953).

On September 23, 1958, the Ponca of Nebraska adopted a resolution and petition noting that only eight adult members participated in the last regular tribal election – held in November 1949, with none held between then and 1958 – and that only 23 adult Indians, not all of them Ponca, resided on the reservation. H. Rep. 2076 at 9; S. Rep. 1623 at 9. The resolution and petition then sought

> the Bureau of Indian Affairs, the county commissioner [sic] of Knox County [Nebraska], and the State of Nebraska to cooperate with us in the

> development of a program leading to disposal of property owned by the Ponca Tribe and the distribution of proceeds and any other assets of the of the Ponca Tribe to those members who may be determined to be entitled to participate in such distribution. We further petition that the Congress of the United States enact legislation to accomplish the purposes of this program, developed pursuant to the petition, and to dissolve the corporation known as the Ponca Tribe of Native Americans of Nebraska.

H. Rep. 2076 at 10; S. Rep. 1623 at 9.

On September 17, 1959, the Knox County Board of Supervisors adopted a resolution "favoring the introduction and passage in the U.S. Congress of a proposal [sic] legislative bill providing for emancipation of the Ponca Tribe of Native Americans of Nebraska...." H. Rep. 2076 at 10; S. Rep. 1623 at 10.

In April 1962, Idaho's Senator Church introduced S. 3174, a bill "to provide for the division of the tribal assets of the Ponca Tribe of Native Americans of Nebraska among the members and to terminate Federal supervision and control over the tribe." S. Rep. 1623 at 1. Enacted on September 5, 1962, this act provided, in brief, for the Secretary of the Interior first to establish a roll of tribal members and then to distribute all tribal assets, both personal property and real property (including trust land), to those members. Members were also eligible to select and purchase as much as five acres of land for a homesite. Any lands not so selected would be sold at auction. 25 U.S.C. §§ 971- 975.

At the time, 691.11 acres of land were held in trust for the Tribe by the United States, and 2,180.39 acres of allotted trust land – all that remained in Ponca hands after the allotment of 27,236 acres in 1889 – were held in fractionated ownership. An additional 152.5 acres was owned by the United States. S. Rep. 1623 at 14-15; H. Rep. 2076 at 15.

In any event, the termination act provided three years for the distribution of assets, 25 U.S.C. § 973(a). Following that, "the Secretary of the Interior shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such tribe and its members has terminated," 25 U.S.C. § 980, which the Secretary did on October 18, 1966. 31 Fed. Reg. 13810. From that point, until the restoration of the Ponca of Nebraska by statute in 1994:

> the tribe and its members [were] not ... entitled to any of the special services performed by the United States for Indians or Indian tribes because of their Indian status, [and] all statutes of the United States that affect Indians or Indian tribes because of their Indian status [were] inapplicable to them, and the laws of the several States [applied] to them in the same manner they apply to other persons or citizens....

25 U.S.C. § 980.

In short, by the passage of the termination act, Congress removed the legal basis for the United States' recognition of the Ponca of Nebraska, and the Secretary then removed all indicia of any continuing political relationship with the Tribe. The United States no longer dealt with the Ponca of Nebraska as a political entity, and the Tribe thus lost its prior recognition.

3. Reinstatement of recognition

Like the loss of recognition, a reinstatement of recognition, the third and final condition for being "a tribe that is restored to recognition," may occur through legislative or administrative action, *i.e.* the Federal acknowledgement process. *Grand Traverse*, 369 F.3d at 967, 969-72. Congress reinstated recognition of the Ponca of Nebraska by statute in 1994.

In 1988, Congress formally repudiated H.C.R. 108 and its policy of termination: "Congress repudiates and rejects House Concurrent Resolution 108 of the 83d Congress

and any policy of unilateral termination of Federal relations with any Indian nation." 25 U.S.C. § 2501(f).

On October 11, 1989, Senators Exon and Kerry, both of Nebraska, introduced S. 1747, the "Ponca Restoration Act." S. REP. 101-330, *Providing for the Restoration of Federal Recognition to the Ponca Tribe of Nebraska, and for Other Purposes*, 101st Cong., 2nd Sess. (1990). ("S. Rep. 101-330.") The legislative history clearly and unambiguously states the purpose of the bill: "to restore Federal recognition to the Northern Ponca Tribe of Indians in the State of Nebraska." S. Rep. 101-330 at 1.

Signed into law on October 31, 1990, the Ponca Restoration Act, 25 U.S.C. §§ 983 – 983h, did exactly that: "Federal recognition is hereby extended to the Ponca Tribe of Nebraska." 25 U.S.C. § 983a. The Act also states:

> All rights and privileges of the Tribe which may have been abrogated or diminished before the date of enactment of this Act by reason of any provision of Public Law 87-629 [25 U.S.C. §§ 971 – 980] are hereby restored and such law shall no longer apply with respect to the Tribe or the members.

25 U.S.C § 983b(a).

In sum, over its history, the Ponca Tribe of Nebraska was recognized by the United States, lost this recognition, and was reinstated to Federal recognition. Therefore the Tribe is an "Indian tribe that is restored to Federal recognition" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

B. Land taken into trust as part of the restoration

Given that the Ponca Tribe of Nebraska is a restored tribe, its land in Carter Lake, Iowa, only satisfies the requirements of § 2719(b)(1)(B)(iii) if it was taken into trust as part of the Tribe's restoration. Nothing in IGRA requires that this be done by Congressional action or in the very same transaction that restored the Tribe. Lands may

be restored to a tribe through the administrative fee-to-trust process. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d 920, 935-36 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 161-64 (D.D.C. 2000); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp. 2d 689, 699-700 (W.D. Mich. 1999).

Still, not every trust acquisition for a restored tribe meets this exception. There must be some limiting condition – something that ties the trust acquisition to, or shows it to be a part of, the tribe's restoration. *Grand Traverse*, 198 F. Supp. 2d 920 at 935. Accordingly, both the NIGC and the courts that have considered the question find the necessary limiting condition in the factual circumstances of the trust acquisition, the location of the trust acquisition, and the temporal relationship of the trust acquisition to the tribal restoration. *See, e.g., Coos,*116 F. Supp. 2d at 164; *Grand Traverse*, 198 F. Supp. 2d at 935; *In Re Sault Ste. Marie Tribe of Chippewa Indians, Resolution No. 2006-101, amendment to Tribal Code § 42.801, Gaming Ordinance* (restored lands opinion, September 1, 2006); *In Re Karuk Tribe of California*, (restored lands opinion, October 12, 2004). Here, while the Tribe has historical and modern ties to the Carter Lake land, and while the trust acquisition process at least began not long after the Tribe's restoration, the facts surrounding the acquisition show conclusively that the Carter Lake land was not restored land.

1. The Tribe's ties to Carter Lake, Iowa.

The Tribe has historical and modern ties to its Carter Lake land and to the surrounding area that weigh in favor a finding that the land is restored.

a. Historic ties.

Scholars have identified the aboriginal territory of the Ponca, and it includes Carter Lake. The eastern boundary of the Ponca territory was, approximately, the Missouri River, and the southern boundary was the Platte River. Figure 2, above, for example, shows that while most Ponca villages were concentrated around what is now Niobrara, Nebraska, Ponca villages have been found as far north and east as Pipestone, Minnesota, and almost as far south as the Platte, further south in Nebraska than present-day Omaha, which surrounds Carter Lake. Ritter, *Piecing Together*, at 274.

Scholars have also written:

> The eastern boundary of the Ponca territory ran *roughly* from the from the west bank of the Missouri, opposite the present-day Sioux City, Iowa, down to the mouth of the of the Platte River.... The North Platte River formed the southernmost boundary of the Poncas. Directly south of that boundary lived the Pawnee, who traditionally hunted to the south....

Joseph H. Cash and Gerald W. Wolff, *The Ponca People* (1975). And see, James H. Howard, *The Ponca Tribe*, 130-131 (1965) (noting that the eastern boundary of the Ponca territory "was a line extending south to the Platte River from a place on the Missouri called *Ni-agatsatsa*," and the "southern boundary of the Ponca domain was the Platte (North Platte west of the fork)").

As a rough marker, however, the Missouri River was not an impassable boundary. Living memory – in the form of deposition testimony from Ponca elders in 1912 in support of a claim before Indian Claims Commission, *Omaha Tribe v. United States*, No. 21,002 (1911-1912) – is consistent with the writings of the scholars. It establishes the Ponca territory, their travels and their hunts east of the Missouri and south to the Platte.

For example, Louis Le Roy, age 70 in 1912, Howard, *Known Village Sites*, at 114, testified as to boundaries:

> They commence east of Omaha city on the other side of the River Wasabte (Black Bear's Den). From there they went to Pipestone, and from Pipestone to Choteau Creek. From there they went up where Crow Creek Agency is, somewhere near there. From there they went to what they call "Dry wood" or "Dry timber." From there they went to what they call "Fork of the Missouri." Then the crossed and went south. From there they went over to the South of the Platte River. They followed the Platte River east and went down as far as the mouth of the Platte. From there they went to Ponca City – where Ponca City now is.

(Le Roy OLC 1912:35.)

Similarly, Chief Yellow Horse, brother of Chief Standing Bear and himself 67 in 1912, testified:

> Even in my time I knew that they went as far [south] as the Platte and as far east as the old Ponca village and even across the Missouri River to kill deer, buffalo, and elk.

(Yellow Horse, OLC 1912:146).

b. Modern ties

The tribe has modern ties to the Carter Lake land. The Tribe had a direct relationship with the Carter Lake land itself before it was taken into trust. The tribe purchased the land in fee in November 1998. In 2000, it finished negotiating and then executed the jurisdiction and cooperation agreement with the City of Carter Lake. The Tribe also erected a small modular building on the land and paved the attendant parking lot. The tribe housed a staff in the building to provide health services and social services. Though the tribe ceased those services because there was not enough money to fund them, it nonetheless still maintains an office there.

2. The timing of the Carter Lake trust acquisition.

This factor too could weigh in favor of a finding that the Carter Lake land is restored land. There were a total of 13 years between Congress's restoration of the Tribe and the acquisition of the Carter Lake land into trust, but the Tribe did not acquire

within that time a significant land base separate and apart from Carter Lake. In fact, what it did acquire represents only a fraction of what it could acquire under its restoration act and of what its Congressionally mandated economic plan call for.

In *In Re Sault Ste. Marie Tribe of Chippewa Indians*, above, for example, the NIGC found that a parcel of land that that tribe acquired in 2000 was not restored lands because of the great length time that passed between the tribe's recognition and the 2000 acquisition and because of the large amount of other property the tribe had otherwise acquired in that time. Specifically, there were 28 years between the Sault Ste. Marie tribe's restoration and the trust acquisition. Further,

> the Tribe had its first reservation parcel by 1975, and three reservation parcels by 1984 as well as an additional 184.21 acres in trust. These parcels were taken into trust three and nine years after Tribal restoration. By the time the St. Ignace parcel was placed into trust in 2000, the Tribe had acquired 50 parcels totaling nearly another 1000 acres into trust. These trust parcels have given [the Tribe] significant acreage devoted to member housing, community services, and economic development that might better be determined part of the Tribes first systematic effort to restore its land base.

In Re Sault Ste. Marie Tribe of Chippewa Indians, restored lands opinion at p. 16. Accordingly, the NIGC found that the 2000 parcel was not restored lands.

Here, there was no such long passage of time and there were no significant intervening land acquisitions. The Tribe owned in trust only an office building in Lincoln, Nebraska (Ponca Tribe of Nebraska resolution 96-101) and approximately 150 acres in Niobrara, Nebraska, for a community building and bison grazing land. (Submission, p. 24; May 27 and June 22, 2003 trust deeds). Though Congress restored the Ponca of Nebraska in 1990, the Tribe only had a constitution approved in 1994. (Ponca Tribe of Nebraska resolution 00-01). The Tribe purchased the Carter Lake land in September 1999, only five years later, and it filed its application to take the Carter

Lake land into trust in January 2000. The trust acquisition would have been complete in September 2000, but for the litigation with Pottawatamie County and the State of Iowa, which postponed the acquisition to the beginning of 2003.

Accordingly, the timing of the Carter Lake acquisition weighs in favor of a finding of restored lands.

3. Factual circumstances surrounding the trust acquisition.

Notwithstanding the foregoing two factors, however, the facts immediately surrounding the trust acquisition show that the Carter Lake land is not restored land.

To begin with, the Tribe did not contemplate a gaming use for the land when it applied to have the land taken into trust. Instead, the Tribe sought to have the land taken into trust so that it might place a healthcare facility on the land:

> WHEREAS: The property will be utilized to provide services to our tribal members, primarily health services. Those services consist of Indian Health Service 638 contracted programs and Bureau of Indian Affairs P.L. 93-638 contract programs....

(Ponca Tribe of Nebraska, resolution 00-01.) This is not to suggest that a tribe's representations of use in a fee-to-trust application will be determinative. Rather, this is one fact among many others that speaks to the circumstances surrounding the trust acquisition.

Next, the State of Iowa and Pottawatomie County challenged the September 15, 2000 decision of the BIA Great Plains Regional Director to take the Carter Lake land into trust. They appealed to the IBIA and contended, in part, that the Tribe really intended to use the land for a casino and that the Regional Director erred in not considering this use. *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002). In its brief before the IBIA, the Tribe again represented that the land would not be used for

gaming but "is to be used for administrative services, including health care, and for health care facilities." (*Iowa v. Great Plains Region Director*, Brief of Ponca Tribe of Nebraska, April 30, 2001, p. 4.)

On August 7, 2002, the IBIA decided in favor of the Tribe, finding that the land "was purchased ... and is currently used for health care facilities" and that any possible gaming use was speculative. The IBIA thus affirmed the Regional Director's decision on August 7, 2002. *Id.*

Rather than continuing to litigate, attorneys for the Tribe and the State reached an agreement – acknowledged in writing, but never formally memorialized – under which Iowa agreed to forego litigation in Federal court, and the Tribe agreed that the Carter Lake land would not be used for gaming. (November 26, 2002, e-mail, from Michael Mason, Esq.; December 12, 2002, letter from Jean M. Davis, Assistant Attorney General, to Michael Mason, Esq.)

Accordingly, on November 26, 2002, the Tribe's then-attorney sent an e-mail to the BIA requesting that a notice of intent to take the Carter Lake land into trust be published as soon as possible. (November 26, 2002, e-mail from Michael Mason.) He requested further that the notice contain the following language, which was substantially identical to what was eventually published:

> The trust acquisition of the Carter Lake lands has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000, decision under the Regional Director's analysis of 25 CFR 151.10(c). As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. sec. 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. sec. 2719(B)(1)(B). There may be no gaming or gaming-related activities on the land unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-

> Related Acquisitions and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act has been obtained.

(November 26, 2002, e-mail, from Michael Mason, Esq.)

On December 3, 2002, the Regional Director published in a newspaper of general circulation in Carter Lake a notice of intent to take the Carter Lake land into trust but omitted this additional language. On December 6, BIA published a "corrected notice of intent to take land into trust" this time including the language. (December 6, 2002, corrected public notice.) An internal BIA e-mail noting the incorrect publication described the additional language as follows:

> The attached Notice of Intent was published in the Council Bluffs, Iowa, newspaper yesterday, December 2 [sic, December 3], 2002. you will recall that the last paragraph in the Notice was a compromise reached by the Ponca Tribe and the State of Iowa as well as Pottawatomie County, Iowa. The Solicitor's office had no problem including the appended paragraph. If we did not include the last paragraph, Iowa would have litigated the matter in Federal Court. Also, the last paragraph was agreed upon by the Ponca's attorney....

(December 3, 2002, e-mail from Tim Lake to various BIA recipients.)

On December 13, 2002, Jean M. Davis, an Iowa Assistant Attorney General, wrote a confirming letter to the Tribe's attorney, stating:

> As you are aware, the Corrected Notice of Intent to take Land in Trust was published in the Council Bluffs *Daily Nonpareil*. The corrected Public Notice makes clear that that lands to be taking into trust in this case will be taken for non-gaming related purposes. The corrected Public Notice also contains the acknowledgement by the Ponca Tribe of Nebraska that the lands are not eligible for any of the exceptions found under 25 U.S.C. sec. 2719(b)(1)(B).
>
> This corrected Public Notice is consistent [with] your repeated representations to me and to Pottawattamie County, made on behalf of the Ponca Tribe of Nebraska, that the Tribe intends to use the lands for the purpose stated in the original application, not for gaming activities. Based upon our agreement that the lands will be used in a manner consistent with the original application and the corrected Public Notice and not for gaming purposes, you have requested that the State of Iowa

> and Pottawatamie County forego judicial review and further appeals. Inasmuch as the corrected Public notice now filed in this case contains the non-gaming purpose restriction to which we have agreed, the State of Iowa has agreed not to pursue judicial review or further appeals of the final decision of the United States department of the Interior in this case.

(December 13, 2002, letter from Jean M. Davis.) The trust acquisition of the Carter Lake land followed in February 2003. (January 28, 2003, warranty deed; February 10, 2003, letter from Acting Regional Director, Great Plains Region, BIA, to Superintendent, Yankton Agency.)

In and of themselves, these facts are determinative. They culminate in the language of the corrected notice, and they unambiguously indicate that at the time of the acquisition, no one involved intended the Carter Lake land to be used for gaming or, more importantly, to be restored land. Only the opposite appears. Every government involved in the acquisition regarded the Carter Lake land as land that was not restored within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii), a characterization that the Tribe has not, until now, disputed.

The Tribe contends that the above facts are not properly considered here because they do not surround the trust acquisition. Rather, the Tribe contends, these facts all post date the acquisition of the Carter Lake lands, which occurred upon the September 15, 2000 decision of the Regional Director. This is not persuasive. The trust acquisition was not, in fact, complete on that date.

There are a number of ways to see this. First and foremost, the record shows that the Regional Director's decision to take the Carter Lake land into trust was not final on September 15, 2000. By its own terms, the decision states that it may be appealed to the IBIA within 30 days, and "if no appeal is timely filed, *this decision will become final for the Department of the Interior at the expiration of the appeal period.*" (September 15, 2000,

Letters from Cora L. Jones, Great Plains Regional Director, BIA, to Carter Lake Mayor, Iowa Governor, Pottawattamie County Supervisors.) (Emphasis added.)

The State of Iowa and Pottawattamie County in fact did appeal to the IBIA, which did not render its decision until August 2002. That is the earliest date in which the trust acquisition might be final because then and only then could an action on the decision be heard in Federal district court. Prior to that, the suit would have been stayed or dismissed under the doctrine of primary jurisdiction. *Reiter v. Cooper,* 507 U.S. 258, 268 (1993); *Grand Traverse Band,* 46 F. Supp. 2d at 706 (primary jurisdiction doctrine permits Federal courts to stay or dismiss actions over which they have jurisdiction pending resolution of issues within the special competence of an administrative agency.) The earliest, then, that the decision was final was in August 2002.

Another indication that the final decision did not occur in September 2000 is found in Department of the Interior land-into-trust regulations. Before land may be taken into trust, these regulations require the publication of a notice, either in the *Federal Register* or in a newspaper of general circulation, stating that "a final agency determination to take land into trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." 25 U.S.C. § 151.12(b). That notice was published here for the first time on December 3, 2002, and the deed transferring the Carter Lake land to the United States in trust for the tribe was not executed until early 2003.

With the exception of the Tribe's statements of intent as to the use of the Carter Lake land, both to the BIA and before the IBIA, all of the above events surround the taking of the Carter Lake land into trust in the latter half of 2002 and early 2003. They are, therefore, properly considered here.

That said, the Tribe also contends in various ways that the limiting language of the corrected notice can of itself have no legal effect. It contends that neither the corrected notice nor the apparent settlement agreement with the State of Iowa was authorized by the tribal government. It contends that in any event, an agreement limiting the use of the Carter Lake lands would require approval by the Secretary under 25 U.S.C. § 81. In sum, it contends that none of the usual mechanisms for limiting uses of land – a deed restriction or covenant or a binding settlement agreement – are present here. Whether or not that is so, it is, ultimately, irrelevant to the determination here.

As to the settlement agreement, the NIGC Chairman need take no position on whether the notice was properly authorized by the tribal government or whether there was a binding settlement agreement between the Tribe and the State of Iowa. It certainly appears from the facts in the record that both the State of Iowa and the BIA regional office believed that the tribal attorney had the apparent authority to act on behalf of the Tribe. It appears as well that Iowa did not pursue litigation further because it struck an agreement with the Tribe that the Carter Lake land would only be used for gaming under a 2-part determination. If that agreement was never valid or binding, Iowa, presumably, is still free to seek judicial review of the IBIA's decision. That action, presumably, could also address the applicability of 25 U.S.C. § 81 and the determination by the Secretary that that law requires. In passing, it should be noted that there does not appear to be any evidence in the record of such a determination after the Tribe entered into a separate 1999 settlement agreement with the City of Lincoln, Nebraska, that prohibited gambling on the Tribe's trust lands there. (*See* May 19, 1999 letter from Chairman Fred LeRoy to Mayor of Lincoln; May 28, 1999 intergovernmental agreement regarding tribal land.)

Be all of that as it may, the question is whether the Carter Lake land is or is not restored land, given the facts that surround the trust acquisition. The question is not whether the notice, or any alleged agreement based upon it, is legally enforceable or whether there is a legally binding document restricting the use of the Carter Lake land in such a way as that the land must perforce cease to be restored lands under IGRA. The facts surrounding the trust acquisition, as set out above and detailed in the corrected notice of intent to take land into trust, demonstrate that the Carter Lake land was not part of a restoration of the Tribe's lands at the time it was taken into trust.

Given all of the foregoing, it is the opinion of the Office of the General Counsel that the land in Carter Lake, Iowa, though "Indian lands" within the meaning of IGRA, is not restored land under 25 U.S.C. § 2719(b)(1)(B)(iii). Gaming is therefore not permissible on the Carter Lake land under IGRA. The Department of the Interior, Office of the Solicitor, concurs in this analysis.

RECOMMENDATION

Disapprove the ordinance.

NATIONAL INDIAN GAMING COMMISSION

October 22, 2007

Via facsimile: 202-887-4288
and First Class mail

Michael Rosetti, Esq.
James Meggesto, Esq.
Akin Gump et al.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036-1564

Re: Ponca Tribe of Nebraska, amended gaming ordinance

Dear Messrs. Rosetti and Meggesto:

This is in reply to your July 23, 2007 letter seeking review and approval of a newly amended tribal gaming ordinance, enacted pursuant to tribal council resolution No. 07-36. The amended ordinance makes one change to the Tribe's existing ordinance, defining as "Indian lands" a parcel of trust land in Carter Lake, Iowa. The amendment was specifically enacted to authorize gaming on that land.

Your submission argues that the Carter Lake land is restored lands within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii) and thus eligible for gaming. After careful consideration, however, I find that though the Ponca Tribe of Nebraska is itself a restored tribe, the Carter Lake land is not restored land. In brief, I find that the factual circumstances surrounding the acquisition of the Carter Lake land show that it was not taken into trust as part of the Tribe's restoration. A detailed explanation is set out in the accompanying memorandum, which I hereby incorporate by reference.

Because I find that the Carter Lake land is not restored land within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii), the amended ordinance is inconsistent with IGRA and is hereby disapproved.

If you have any questions, please feel free to contact Michael Gross, Associate General Counsel, General Law, at 202-632-7003.

Sincerely,

Philip N. Hogen
Chairman

EXHIBIT
2

FEDCAD 800-631-6989

cc: Larry Wright Jr., Chairman, Ponca Tribe of Nebraska
Penny Coleman, Acting General Counsel
Michael Gross, Associate General Counsel
Jonathan Damm, DOI Office of the Solicitor

National Indian Gaming Commission

In Re: Gaming Ordinance of The Ponca Tribe of Nebraska

December 31, 2007

FINAL DECISION AND ORDER

Appeal to the National Indian Gaming Commission ("NIGC" or "Commission") from a disapproval of a site specific gaming ordinance submitted by the Ponca Tribe of Nebraska ("Tribe"). This appeal is brought pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et. seq.*, and NIGC regulations at 25 C.F.R. Part 524.

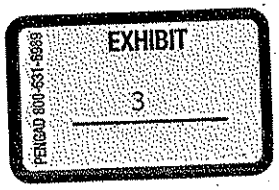
Appearances

Michael Rossetti, James Meggesto, for the Ponca Tribe of Nebraska
Michael Gross for the Chairman, National Indian Gaming Commission
John Lundquist, Assistant Attorney General, for the State of Iowa, a limited participant pursuant to 25 C.F.R. § 524.2

DECISION AND ORDER

After careful and complete review of the agency record and pleadings filed by both the Tribe and the Chairman, as well as the State of Iowa, a limited participant pursuant to NIGC regulations at 25 C.F.R.§ 524.2, the Commission finds and orders that:

1. We affirm the Chairman's decision that the Carter Lake land meets the location and temporal factors of the restored lands analysis.



2. We reverse the Chairman's decision with respect to the factual circumstances factor for the following reasons:

(a) The Chairman's disapproval improperly relied on the Tribe's intended use of the land;

(b) The Chairman's disapproval improperly relied on events that occurred after the Department of the Interior's (DOI) final agency decision was made; and

(c) The factual circumstances of the acquisition weigh in favor of restoration.

3. We reverse the Chairman's disapproval of the ordinance because we find that the Carter Lake land meets the restored lands exception.

PROCEDURAL AND FACTUAL BACKGROUND

The factual background of the Tribe's history, including its termination and restoration to federal recognition, are well set forth in the Carter Lake Lands Opinion Memorandum (Disapproval Memo), which is incorporated by reference into the NIGC Chairman's (Chairman) disapproval of the ordinance. We see no need to revisit those facts here. The following events, however, are of particular significance to our decision.

The Tribe was restored to federal recognition in 1990 by virtue of the Ponca Restoration Act, 25 U.S.C. §§ 983 – 983h.

On September 24, 1999, the Tribe purchased in fee approximately 4.8 acres of land in Carter Lake, Iowa. Shortly thereafter, on January 10, 2000, the Tribe passed a resolution seeking to have the DOI place the land into trust. The Tribe's stated intent was to place a healthcare facility on the land. (Ponca Tribe of Nebraska, Resolution 00-01.)

On September 15, 2000, the Great Plains Regional Director for the Bureau of Indian Affairs (BIA) within DOI wrote to relevant state and local officials in Iowa and stated her "intent to accept the land into trust for the benefit of the Ponca Tribe of Nebraska." (Letters from Cora L. Jones, Great Plains Regional Director, BIA, to Carter Lake Mayor, Iowa Governor,

Pottawattamie County Supervisors, September 15, 2000.) Both the State of Iowa and Pottawattamie County appealed the September 15 decision to the Interior Board of Indian Appeals (IBIA). They contended, in part, that the Tribe really intended to use the land for a casino and that the Regional Director erred in not considering this use. *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002).

The IBIA rejected the argument, finding that the land "was purchased ... and is currently used for health care facilities" and that any possible gaming use was speculative. *Id.* The IBIA thus affirmed the Regional Director's decision on August 7, 2002. *Id.*

Sometime following the IBIA decision in the Tribe's favor, the Tribe, the State of Iowa, and Pottawattamie County reached an agreement that avoided further litigation. Although there is no evidence to show that the agreement was reduced to writing, it was acknowledged through correspondence both by the Tribe and the State. On November 26, 2002, the Tribe's then attorney sent the BIA an e-mail message requesting that a notice of intent to take the land into trust be published and requested that the following language be included:

> The trust acquisition of the Carter Lake lands has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000, decision under the Regional Director's analysis of 25 CFR 151.10(c). As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. sec. 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. sec. 2719(b)(1)(B). There may be no gaming or gaming-related activities on the land unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act has been obtained.

(November 26, 2002, e-mail, from Michael Mason, Esq.)

On December 3, 2002, the Regional Director published in a newspaper of general circulation in Carter Lake a notice of intent to take the Carter Lake land into trust but omitted the additional language requested by the Tribe. On December 6, BIA published a "corrected notice of intent to take land into trust" this time including the language. (Council Bluffs Daily Nonpareil, December 6, 2002). An internal BIA e-mail noting the incorrect publication described the additional language as follows:

> The attached Notice of Intent was published in the Council Bluffs, Iowa, newspaper yesterday, December 2 [sic, December 3], 2002. You will recall that the last paragraph in the Notice was a compromise reached by the Ponca Tribe and the State of Iowa as well as Pottawatomie County, Iowa. The Solicitor's office had no problem including the appended paragraph. If we did not include the last paragraph, Iowa would have litigated the matter in Federal Court. Also, the last paragraph was agreed upon by the Ponca's attorney....

(December 3, 2002, e-mail from Tim Lake to various BIA recipients.)

On December 13, 2002, Jean M. Davis, an Iowa Assistant Attorney General, wrote a confirming letter to the Tribe's attorney, stating:

> As you are aware, the Corrected Notice of Intent to take Land in Trust was published in the Council Bluffs *Daily Nonpareil*. The corrected Public Notice makes clear that lands to be taking into trust in this case will be taken for non-gaming related purposes. The corrected Public Notice also contains the acknowledgement by the Ponca Tribe of Nebraska that the lands are not eligible for any of the exceptions found under 25 U.S.C. sec. 2719(b)(1)(B).
>
> This corrected Public Notice is consistent [with] your repeated representations to me and to Pottawattamie County, made on behalf of the Ponca Tribe of Nebraska, that the Tribe intends to use the lands for the purpose stated in the original application, not for gaming activities. Based upon our agreement that the lands will be used in a manner consistent with the original application and the corrected Public Notice and not for gaming purposes, you have requested that the State of Iowa and Pottawatamie County forego judicial review and further appeals. Inasmuch as the corrected Public Notice now filed in this case contains the non-gaming purpose restriction to which we have agreed, the State of Iowa has agreed not to pursue judicial review or further appeals of the final decision of the United States Department of the Interior in this case.

(December 13, 2002, letter from Jean M. Davis.)

On January 28, 2003, following the publication of the corrected notice, the Tribe executed a deed conveying the Carter Lake land to the United States, and the BIA completed the acquisition in February 2003. (January 28, 2003, warranty deed; February 10, 2003, letter from Acting Regional Director, Great Plains Region, BIA, to Superintendent, Yankton Agency.)

On July 23, 2007, the Tribe submitted a site specific class II gaming ordinance amendment (ordinance) to the Chairman for review and approval. In this ordinance, the Tribe defined a parcel of trust land in Carter Lake, Iowa (Carter Lake land) as "Indian lands" meeting the restored lands exception to the general prohibition on gaming on lands acquired after October 17, 1988. 25 U.S.C.§ 2719(b)(1)(B)(iii). By letter dated October 22, 2007, the Chairman found that the Carter Lake land is not restored lands within the meaning of 25 U.S.C. § 2719 (b)(1)(B)(iii) and disapproved the ordinance. The Tribe filed a Notice to Appeal on November 9, 2007. Furthermore, on November 16, 2007, the Tribe and the Chairman filed a Joint Motion for Expedited Decision, requesting that the Commission issue a final decision on the appeal within 35 days or prior to the December 31, 2007 scheduled departure of Vice-Chairman Cloyce V. Choney.

The Commission issued a decision on the Joint Motion stating that it would do all in its power to issue a decision prior to the departure of Vice-Chairman Choney, but that circumstances may require additional time to review the matter and issue a decision, and that the Commission could not agree to be bound by an earlier deadline than that which is set forth in its regulations.[1] Under NIGC regulations, the Commission has ninety (90) days to decide an appeal of an ordinance disapproval.

[1] The Commission was able to accommodate the Joint Motion and this Decision and Order is issued prior to the departure of Vice-Chairman Choney.

In addition, the Commission invited the State of Iowa to file a Request to Participate pursuant to 25 C.F.R. § 524.2. The State filed its Request to Participate on November 29 and the Commission granted the request on November 30. Pursuant to a briefing deadline established by the Commission, both the Tribe and the Chairman replied to the State's filing on Dec. 7.

DISCUSSION

Legal Framework

Tribal ordinances or resolutions governing the conduct or regulation of Class II gaming on Indian lands are reviewed and approved by the Chairman under 25 U.S.C. § 2710(b)(2). Amendments to a tribe's gaming ordinance are submitted for approval by the Chairman in accordance with 25 C.F.R. § 522.3. A tribe may appeal a disapproval of a gaming ordinance, resolution, or amendment within 30 days after the Chairman serves notice of his determination of disapproval. 25 C.F.R. Part 524. The Tribe's appeal here was filed in a timely manner.

IGRA permits gaming only on Indian lands, 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2), which it defines as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

There is no dispute that the Carter lake land meets this definition. However, there is a general prohibition on gaming on trust land acquired after October 17, 1988, unless the land meets one of several exceptions. 25 U.S.C. § 2719(a). Because the Carter Lake land was acquired after this date, the question then becomes whether the Carter Lake land meets any of the exceptions in § 2719. The Tribe contends that the land meets the restored lands exception, which requires land to be "taken into trust as part of . . . the

restoration of lands for an Indian tribe that is restored to federal recognition."[2] 25 U.S.C. § 2719(b)(1)(B)(iii).

Courts apply a three-factor test to determine whether lands are "restored" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii): (1) temporal proximity to restoration; (2) historical and modern nexus to the location; and (3) factual circumstances. *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Atty.*, 198 F. Supp. 2d 920, 935 (W.D. Mich., 2002). Applying these criteria to the restored lands exception places "belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion." *Id.* Courts apply the factors in a balancing test, and not all factors must weigh in a tribe's favor for the land to meet the restored lands exception. *Grand Traverse*, 198 F. Supp. 2d 920 at 936; *Wyandotte Nation v. National Indian Gaming Comm'n*, 437 F.Supp. 2d 1193, 1214 (D.Kan. 2006). In fact, the court in *Grand Traverse* found that "the land may be considered part of a restoration of lands on the basis of timing alone" 198 F. Supp. 2d 920 at 936, and the *Wyandotte* court found that the location factor is "arguably the most important component of the test for the restoration of land exception." *Wyandotte*, 437 F.Supp 2d 1193, 1214.

The Chairman's Decision and the Issues Presented by the Tribe's Appeal

Because the Tribe's ordinance was site-specific and defined the Carter Lake land as Indian land that meets the restored lands exception, the Chairman had to determine the validity of this assertion in the process of deciding whether to approve or disapprove the ordinance. *See*

[2] There is no dispute that the Tribe is a restored tribe.

e.g. Citizens Against Casino Gambling in Erie County, et. al. v. Kempthorne, et. al., 471 F. Supp. 2d 295, 323 (W.D. N.Y., 2007.

The Chairman found that the Carter Lake parcel meets both the temporal and location factors of the restored lands analysis, and there has been no challenge to these findings. We agree with the Chairman's findings in this regard and affirm those findings. What is in dispute, then, is the Chairman's application of the factual circumstances element and his resultant disapproval of the ordinance on the grounds that it purported to authorize and regulate gaming on lands upon which the Tribe could not lawfully game.

The Chairman found the following facts to be determinative in disapproving the ordinance: (1) the Tribe did not contemplate a gaming use for the land when it applied for trust status; (2) Iowa and Pottawattamie County challenged the Regional Director's decision to take the land into trust; (3) The Tribe represented before the IBIA that the land would not be used for gaming; (4) the IBIA affirmed the Regional Director's decision, finding it only speculative that the Tribe intended to game on the land; (5) the Tribe and the State reached agreement that the State would forgo litigation in Federal court and the Tribe acknowledged the land did not meet the restored lands test; (6) the Tribe's attorney requested that BIA's public notice contain language to the effect that the Tribe acknowledged that the lands are not restored lands; (7) the BIA published the requested language; and (8) the State wrote a confirming letter to the Tribe in which it agreed not to pursue judicial review of the IBIA's decision. These events, the Chairman found, show that "at the time of the acquisition, no one involved intended the Carter Lake land to be used for gaming or, more importantly, to be restored land." Disapproval Memo at 27-30. Each of these factors fall into one of the following three categories: (1) the Tribe's expressions of

intent as to its use of the land; (2) the Tribe's expressions of intent regarding the restored lands status of the land; and (3) reliance by third parties upon those expressions of intent.

The Tribe argues that the Chairman erred in considering these facts for several reasons. First, prior agency opinions show that a tribe's intended use of the land at the time it is taken into trust is not relevant to the restored lands analysis. Tribe's Notice of Appeal at 5-6. Second, the Tribe's expressions of its intent that the Carter Lake parcel was not restored lands occurred outside the relevant period for consideration. *Id.* at 10-12. Third, case law does not support subjective intent as a factual circumstance, *Id.* at 7, and even if it did, the expressions of intent do not outweigh the overwhelmingly positive analysis of the location and temporal factors. *Id.* at 8. Finally, reliance by third parties was not within the Commission's authority to consider in a gaming ordinance review. Tribe's Response to Submission of the State of Iowa at 3-8.

The State argues, in part, that the Commission should affirm the Chairman's decision because the Tribe "previously repudiated any claim it may have had that the Carter lake trust holdings constitute restored land eligible for class III gaming under IGRA." Request to Participate in Appeal at 5 and that "[b]oth the State of Iowa and the BIA acted in reliance on [the Tribe's] representations." *Id.* at 7. [3]

Tribe's Intended Use of the Land is Not Relevant to a Restored Lands Analysis

The Chairman based his disapproval in part on the Tribe's representations that it intended to use the land for a health care facility and the IBIA ruling that gaming was only a speculative use. Disapproval Memo at 27-28. Reliance on these facts was error. Prior agency decisions

[3] Pottawattamie County was invited to submit information to the NIGC relative to the status of the Carter Lake land but did not do so. See Letter to Pottawattamie County Board of Supervisors from Michael Gross, NIGC Senior Attorney, dated March 10, 2006.

instruct that intended use at the time of the trust acquisition has no place in a restored lands analysis.

The question of whether lands are restored is, in fact, quite distinct from the question of whether a tribe intends to conduct gaming on those particular lands. In other words, the focus of the analysis is whether the land was acquired as part of the Tribe's restoration, not on what the Tribe planned to do with the land at the time. Most restored lands determinations are made through the DOI's trust acquisition process in cases where a tribe has expressed intent to game. However, there are also a number of cases, such as this one, where tribes acquire trust land for another purpose, and later, often within only a few years, receive a positive restored lands determination so that they may conduct gaming. Regardless of when the tribe expresses its intent to game, the analysis is the same.

On remand from the District Court in *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000), the DOI found that the land at issue was restored lands. It noted that the land "was taken into trust for historical, cultural and economic self-sufficiency" and that "[a]t the time of the land being taken into trust, the Tribes were not considering it for gaming purposes" but changed their intended purpose "to maximize their economic development opportunities." DOI Memorandum from Philip Hogen, Associate Solicitor, Division of Indian Affairs to Assistant Secretary – Indian Affairs Re: *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000) in regard to proposed gaming on the Hatch Tract in Lane County, Oregon (Dec. 5, 2001) (*Coos Opinion*). Only 22 months after the land was taken into trust for another purpose, the Tribes announced their intent to game and requested a restored lands opinion.

Similarly, the Commission's Office of General Counsel (OGC) has issued two opinions in favor of restored lands for tribes that originally expressed their intent to use the property for another purpose. The Bear River Band of Rohnerville Rancheria sought a restored lands decision in much the same way the Tribe does here – by way of a site-specific ordinance. The land the Bear River Band sought to game on was land it had purchased through a Community Development Block Grant from the U.S. Department of Housing and Urban Development and with the assistance of the BIA. The Secretary accepted the land into trust, and only one year later, the Bear River Band began to seek a restored lands determination. Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Bear River Band of Rohnerville Rancheria at 2 (August 5, 2002). The OGC found that the land was restored lands under the IGRA. *Id.* at 14.

More recently, our OGC found that the land upon which the Mooretown Rancheria wished to conduct gaming was restored land despite that the land had been originally acquired for housing purposes and, like the Bear River Band land, was also purchased with HUD money. Memorandum from John R. Hay, NIGC Staff Attorney, through Penny J. Coleman, NIGC Acting General Counsel to Philip N. Hogen, NIGC Chairman Re: Mooretown Rancheria Restored Lands at 9-10 (October 18, 2007). Again, only two years had passed before the Tribe announced its intent to game and sought a restored lands opinion. *Id.*

As is shown by these earlier restored lands opinions, the Tribe's intended use of the land is not relevant to a restored lands finding and tribes are free to change their intended use of the land to take advantage of gaming opportunities if the land otherwise meets the relevant factors. Here, the Tribe took more than twice as long as other tribes to change course and pursue gaming. Like Coos, Bear River, and Mooretown, the Tribe is free to do so. It was error for the Chairman

to consider that the Tribe did not contemplate a gaming use for the land when it applied for trust status; that it represented before the IBIA that the land would not be used for gaming; and that the IBIA relied on that representation.

The Trust Decision was Made When the IBIA Issued its Final Agency Decision and Events Which Post-Date this Decision Were Improperly Considered

Although we have found the intended use of the land is not relevant, we still must determine whether the Tribe's expressed intention with regard to the restored status of the land, and reliance thereon, are factual circumstances appropriately considered in the restored lands analysis. Before we can do so, however, we must address whether the Tribe's expressions of that intent were timely considered; i.e. were they present at the time the land was taken into trust?

The core question of any restored lands analysis is whether the land at issue was "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." *Grand Traverse* at 934. Whether the lands are taken into trust as part of a restoration of lands necessarily depends on the facts present at the time of the acquisition, or, more precisely, the facts present when the decision to acquire the land was made. Any facts which were not present at the time of the decision are not part of the trust acquisition, and, therefore, are not properly considered.

At issue is exactly when the acquisition occurred. There are three views expressed here:

1. The Tribe argues that the decision was made on September 15, 2000, when the Regional Director issued the decision to take the land into trust. Tribe's Notice of Appeal at 11.
2. The Chairman stated that the earliest the decision could have been final was in August 2002 when the IBIA decision was issued. Disapproval Memo at 27-30.

3. The Chairman then expanded the time frame to the date the Secretary signed the deed in February 2003, and relied on this later date and events which occurred up and until this date, in his disapproval of the ordinance. *Id.* The State agrees with the Chairman's reliance on this later date. State of Iowa's Request to Participate at 6.

We believe the correct view, first expressed by the Chairman, is that the land to trust decision was made when it became a final agency decision, i.e. upon the IBIA's decision. Consequently, events that occurred after that were not considered as part of the trust decision. Support for this view rests in DOI's regulations that govern both IBIA appeals and land acquisitions. Interior's regulations provide that the IBIA decides "finally for the Department appeals to the head of the Department pertaining to administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR chapter I."[4] 43 C.F.R. § 4.1(b)(2). Additionally, 25 C.F.R. § 4.312 states, "rulings by the [IBIA] are final for the Department and must be given immediate effect." Finally, 43 C.F.R. § 4.21(d) provides, in pertinent part:

> No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor.

These regulations unequivocally demonstrate that the IBIA decision is a final agency decision.

BIA regulations requiring public notice that a final decision has been made are also instructive here. Section 151.12(b) of 25 of C.F.R. requires public notice "that a final agency determination to take land into trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." 25 C.F.R.

[4] The land into trust process is governed by 25 C.F.R. Part 151, which falls within chapter I of 25 C.F.R, and is therefore appropriately within the jurisdiction of IBIA.

§ 151.12(b). When the BIA amended its regulation regarding land acquisitions, it added this notice requirement to facilitate judicial review of decisions by the Secretary to take land into trust. *See* 61 Fed. Reg. 18082 (Apr. 24, 1996); *See also*, *McAlpine v. United States*, 112 F.3d 1429, 1433 (10th Cir. 1997). The preamble to the BIA regulation explains that the rule:

> establishes a 30-day waiting period after final administrative decisions to acquire land in trust under the [IRA]. The Department is establishing this waiting period so that parties seeking review of final decision by the [IBIA]...will have notice of administrative decisions to take land into trust before title is actually transferred. This notice allows interested parties to seek judicial or other review under the [APA]...

61 Fed.Reg. 18082 (Apr. 24, 1996). The preamble further explains:

> following consideration of the factors in the current regulations and completion of the title examination, the Department, through Federal Register notice, or other notice to affected members of the public, will announce any final administrative determination to take land in trust. The Secretary will not acquire title to the land in trust until at least 30 days after publication of the announcement. This procedure permits judicial review before transfer of title to the United States. The Quiet Title Act (QTA), 28 U.S.C. § 2409(a), precludes judicial review after the United States acquires title. (citations omitted).

The timing and purpose of the public notice shows that it was not considered as part of the trust decision. The purpose of the notice is to advise the public that a land to trust decision has been made so that affected parties may sue in federal court to prevent the trust acquisition before the land is formally acquired because the Quiet Title Act precludes judicial review after the United States acquires title. See 28 U.S.C. § 2409(a). See also, *Governor of Kansas, et. al. v. Kempthorne*, 505 F.3d 1089 (10th Cir. 2007). The agreement entered into between the Tribe and the State, and the written documentation of that agreement, all occurred after, and as a result of, the land to trust decision. It was *because* the IBIA issued a final decision that the State sought the agreement with the Tribe that it would not pursue its remedies in federal district court so long as the Tribe "acknowledged that the lands are not eligible for the exceptions under 25 U.S.C.

§ 2719(b)(1)(B)."[5]

Finally, and importantly, the IBIA acts under authority delegated to it by the Secretary. See 43 C.F.R. 4.1, which provides that "[t]he Office of Hearings and Appeals, [of which the IBIA is a board] is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings and appeals and other review functions of the Secretary." *Id.* Because the IBIA acts for the Secretary and decides matters finally as the Secretary would, the IBIA decision here was, in effect, the Secretary's decision. The actions that followed that decision, i.e. the publication of the notice and the signing of the deed were not part of the decision whether to take the land into trust, but were actions the Secretary was required to take following a decision to take land in trust. This conclusion is supported by the use of the word "shall" in 25 C.F.R. § 151.12(b). Once the waiting period has expired and there is no challenge to the decision or request for reconsideration, the Secretary must acquire the land into trust.

We are not persuaded by the Tribe's argument that the decision-making process ended with the Regional Director and any events that occur after that point are not properly considered. Had the State not appealed, the Tribe would be correct in its timing analysis; however, where an appeal is timely filed and further documents may be submitted for consideration,[6] the Regional Director's decision cannot be said to have been final. While the Regional Director expressed intent to take the land into trust, that decision was timely appealed to IBIA and it is the IBIA decision that constitutes final agency action. DOI was not, as the Tribe suggests, "simply defending its decision by following the process set forth by law." Tribe's Notice of Appeal at 11.

[5] As discussed at pages 16-17, *infra*, the question of restoration is a legal one not affected by a tribe's acknowledgement that the land is or is not restored.
[6] *See* 43 C.F.R. § 4.22 for regulations regarding submissions to IBIA.

It was still actively engaged in the decision-making process up and until the final agency decision.

The Chairman considered events that occurred up until the Secretary signed the deed. Even if this were the appropriate time-frame for considering evidence, we agree with the Tribe that "there is no evidence that Interior 'reviewed, analyzed, or considered whether to approve or endorse whatever 'agreement' that may have given rise to the notice before publishing it in the local newspaper. Rather, the Department simply accepted certain language to be appended to the . . . notice without independently determining whether it concurred with the substance..." Tribe's Request for Indian Lands Opinion at 33 (July 23, 2007). See also, internal BIA e-mail referencing the language in the notice as a "compromise reached by the Ponca Tribe and the State of Iowa ... [and that] the Solicitor's office had no problem including the appended paragraph. If we did not include the last paragraph, Iowa would have litigated the matter in Federal Court." December 3, 2002, e-mail from Tim Lake, Superintendent, BIA, Yankton Agency, to various BIA recipients.

Consequently, we find that the IBIA decision is the point at which the decision was made by the agency, and any relevant events that occur up and until this point are properly considered as part of that decision. Events occurring after the decision are not properly considered. As such, the Chairman erred in relying on events that occurred after DOI's decision was final.[7]

[7] Because we find that the Tribe's expressed intentions and reliance thereon are not relevant because they occurred after the DOI final decision, we need not reach the question whether the subjective intent of a tribe and reliance thereon are proper factual circumstances to be considered in a restored lands analysis nor do we reach the question of the enforceability of the agreement between the Tribe and the State.

The Carter Lake Land Meets the Location, Temporal Proximity, and Factual Circumstances Factors and is Therefore Restored Land under the IGRA

The Chairman set forth a strong positive analysis of the location and temporal factors, which we affirm. Because the test for restored lands is a balancing test, we weigh as well the factual circumstances prong of the analysis. As discussed at pages 12-16, *supra*, the factual circumstances on which the Chairman relied occurred after IBIA's final decision and were therefore improperly considered. When we evaluate, however, the factual circumstances that occurred within the relevant time period, we find one fact in particular that weighs in favor of restoration, and no facts which weigh against it. Whether a tribe has significant intervening trust parcels is a fact that we have previously considered as part of the factual circumstances analysis. See Memorandum to Philip N. Hogen, Chairman, from Penny J. Coleman, Acting General Counsel, Re: Cowlitz Tribe Restored Lands Opinion, November 22, 2005 at 9; Memorandum to Philip N. Hogen, Chairman, through Penny J. Coleman, Acting General Counsel, from John R. Hay, Staff Attorney, Re: Mooretown Rancheria Restored Lands, October 18, 2007. Here, we note that the Carter Lake land is among the first trust acquisitions of the Tribe ("[t]he Tribe owned in trust only an office building in Lincoln, Nebraska . . . and approximately 150 acres in Niobrara, Nebraska, for a community building and bison grazing land." Disapproval Memo at 26.). We find that the factual circumstances prong, as well as the location and temporal prongs, weighs in favor of a finding that the Carter Lake land is restored.

Despite the clear direction of the law, we are troubled by the inequities worked in this case. We do not "diminish the importance of [the Tribe's] concession to the State of Iowa." State's Request to Participate at 9. It seems the Tribe led the State down the primrose path with promises it never intended to keep. Yet, the law here prevents us from granting either a remedy

to the State or imposing a consequence on the Tribe. Without a consequence for those who so boldly promise whatever suits them, we are concerned by the tarnish the Ponca's actions may leave on the credibility and good faith of other tribes that attempt to have land taken into trust.

CONCLUSION

We affirm in part and reverse in part the Chairman's decision. We affirm the Chairman's determination that the land meets the location and temporal factors of the restored lands analysis. We reverse the Chairman's decision with respect to the factual circumstances factor because it improperly relied on the Tribe's intended use of the land and events that occurred after the Department of Interior's final agency decision was made. Because the Chairman relied on the factual circumstances findings to disapprove the ordinance, we reverse the Chairman's disapproval of the ordinance. The Carter Lake land meets the restored lands exception. The ordinance is therefore hereby approved.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION.

Philip N. Hogen
Chairman

Cloyce V. Choney
Vice-Commissioner

Norman H. DesRosiers
Commissioner

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPL REFER TO:

JUN 13 2008

Honorable Phillip N. Hogen
Chairman, National Indian Gaming Commission
1441 L St., NW
Suite 9100
Washington, DC 20005

Dear Chairman Hogen:

I am writing in regard to your May 19, 2008 letter to former Assistant Secretary – Indian Affairs Carl Artman and Deputy Associate Solicitor, Division of Indian Affairs, Edith Blackwell enclosing your May 19, 2008 Indian lands opinion for the Poarch Band of Creek Indians, which purports to recognize the Band's right to game on the Tallapoosa Site in Alabama. In the letter, you informed Mr. Artman and Ms. Blackwell that you were issuing the Indian lands opinion despite the fact that your Office of General Counsel (OGC) and the Solicitor's Office Division of Indian Affairs (DIA) had not reached agreement on whether the Tallapoosa Site is restored lands and thus covered by an exception to the general prohibition on gaming on lands acquired after October 17, 1988.

On January 14, 2008, the Deputy Associate Solicitor provided your Acting General Counsel with a letter of non-concurrence in the National Indian Gaming Commission's (NIGC's) draft Indian lands opinion. The January 14, 2008 letter provided specific details as to why DIA disagreed with the draft opinion. The non-concurrence focused on the restored tribe analysis. Generally, DIA does not believe that the Poarch Creek Band ever had a government-to-government relationship with the United States until it was acknowledged through the Part 83 process in 1983. The Deputy Associate Solicitor concluded that the record simply does not support the Band's existence as a separate tribal entity with a governmental relationship with the United States, nor does it support that the United States terminated this governmental relationship. The Deputy Associate Solicitor also questioned the Band's relationship with the Creek burial grounds located at the Tallapoosa Site. Your May 19, 2008 opinion does not address any of the concerns raised in our January 14, 2008 letter.

Given that the legal conclusions reached by OGC are inconsistent with the legal views of the Office of the Solicitor, and that, as discussed below, NIGC has no statutory mandate to issue Indian lands opinions independently, the Secretary has directed me to inform you that he is invoking his authority referenced in 43 C.F.R. § 4.5 to review your decision and has asked me to assist him in that review. Accordingly, in accordance with 43 C.F.R. § 4.5(c), please provide me with the administrative record supporting your May 19, 2008

decision. Pending this review, you may not take any further action to implement your May 19, 2008 decision.

I understand that the matter concerning the Poarch Creek Band first arose in November 2003, when the Assistant Attorney General for the State of Alabama questioned the Band's gaming activities on three parcels. From what I understand, NIGC reviewed two of those parcels and determined that they met the initial reservation exception in 25 U.S.C. § 2719(b)(1)(B)(ii). The third gaming location, the Tallapoosa Site, remained at issue, however, because the land was taken into trust in 1995 and is not within the Band's initial reservation. The Band has continued its gaming operation on the Tallapoosa Site during the pendency of NIGC's review.

While the request from the Assistant Attorney General came to NIGC in November 2003, it was not until January 2006 that the DIA received OGC's first draft of its Poarch Creek Indian lands opinion. Attorneys in DIA expressed their concern with the Poarch draft as early as February 2006. OGC attorneys and DIA attorneys met in May, October, and December 2006 to discuss DIA's concerns with the draft opinion. After the December 12, 2006 meeting, OGC agreed to revise the January 2006 draft opinion. DIA attorneys and OGC attorneys met together with the Tribe on March 13, 2007 to discuss the unresolved issues. On March 26, 2007, the Band's attorneys provided OGC and DIA with their response to the restored lands issues raised at the March 13 meeting. It was not until September 24, 2007 that OGC provided DIA with a revised draft dated July 18, 2007.

After receipt of the July 18, 2007 draft, attorneys in OGC and DIA tried to reach consensus on the legal position. On December 27, 2007, OGC notified DIA that it wanted DIA's response prior to December 31, 2007. On January 3, 2008, the Deputy Associate Solicitor sent OGC a short letter expressing DIA's non-concurrence with the July 18, 2007 draft. On January 7, 2008, you, the Deputy Solicitor, and attorneys from OGC and DIA met via a conference call to discuss the unresolved issues. At that time, OGC requested a detailed written non-concurrence.

On January 14, 2008, the Deputy Associate Solicitor provided a six-page letter that detailed most of the rationale for the non-concurrence to OGC's July 18, 2007 opinion. Since its receipt of the January 14, 2008 letter, OGC has made no efforts to resolve the issues raised by DIA. As previously noted, the May 19, 2008 opinion you signed made no reference to the concerns raised in the January 14, 2008 letter.

Generally, the Office of the Solicitor and the OGC have worked cooperatively on Indian lands opinions since the inception of your Office of General Counsel. In March 2000, the cooperative process was memorialized in a Memorandum of Understanding signed by the Associate Solicitor, DIA and General Counsel, NIGC. In 2006, it became apparent that a new Memorandum of Understanding needed to be negotiated. I signed a Memorandum of Agreement (MOA) on May 31, 2006, for a six-month period. That agreement was renewed in February 2007 for another six-month term. While it expired in August 2007 and has not been renewed, OGC and DIA have both expressed a willingness to continue

to abide by its terms. Inexplicably, the NIGC took no steps after receiving the January 14, 2008 non-concurrence to attempt to follow the MOA's process fot resolution of non-concurrence issues. For example, no effort was made to have further discussions with DIA or senior Solicitor's Office officials, including discussions whether to refer the matter to the Office of Legal Counsel, as was expressly provided in the MOA.

Generally, when OGC attempts to draft an Indian lands opinion, it typically writes a broad and wide-ranging opinion that touches on issues not unique to gaming. NIGC Indian lands opinions discuss a tribe's jurisdiction over lands, a tribe's governmental authority, the boundaries of a tribe's reservation, and the history of a tribe. In NIGC's Indian lands opinion regarding the restored land for a restored tribe exception, OGC extensively delves into the history of the tribe's relationship with the United States, especially with the Secretary of the Interior. OGC also looks at the history of the tribe's occupation of certain lands and communications between the Department of the Interior and the tribe. DIA has in the past questioned the need for delving into such issues that are not specific to gaming. While the Solicitor's Office and OGC have reached consensus on all Indian lands opinions prior to the Poarch Creek decision, it has not been without controversy. DIA has on several occasions agreed with NIGC's conclusions but not with its analysis. For the Poarch Creek decision, as the January 14, 2008 letter sets out, my Office did not agree that the Poarch Creek Band is a restored tribe for Indian Gaming Regulatory Act (IGRA) purposes.

As the chief legal officer for the Department of the Interior, it is incumbent on me to ensure that all legal opinions are consistent and sound. Nothing in IGRA changes my role as the principal legal adviser to the Secretary and the chief legal officer of the Department. Congress expressly placed the NIGC "within the Department of the Interior."[1] It is my responsibility to supervise the legal work of the Department.[2]

What is at issue is only the Poarch Creek Band's Indian lands opinion and the prospective drafting, review, and approval of Indian lands opinions.[3] The Department is not seeking to review previously issued NIGC Indian lands opinions through this process. In addition, DIA and OGC worked together to draft language in the 25 C.F.R. Part 292 regulations that provided that the regulations do not apply to final agency actions based on legal opinions issued prior to the effective date of the regulations. Nor is the Department calling into question the overall good work of the NIGC. NIGC's role in the regulation of Indian gaming has been and will continue to be positive and important. The Secretary has no desire to intrude in NIGC's statutory role for the regulation of Indian gaming.

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[1] 25 U.S.C. § 2704(a).

[2] *See* 109 DM 3.1; 110 DM 2.2; 209 DM 3.

[3] My Office defines Indian lands opinions as legal opinions that analyze whether gaming is authorized on particular lands. These include opinions on whether lands meet the definition of Indian lands; whether a tribe is exercising jurisdiction and governmental authority over those lands; whether gaming is authorized under 25 U.S.C. § 2719; and a legal analysis of 25 C.F.R. Part 292.

However, IGRA does not vest all authority for Indian gaming in one entity. IGRA is not an example of a statute that transferred all responsibility out of the Department. The scope and parameters of the NIGC's power are established and limited by the language of IGRA, the NIGC's sole source of statutory authority. In the purpose section of IGRA,[4] Congress clearly stated its intent to establish the NIGC as a commission to regulate Indian gaming. However, the scope of the power granted to the NIGC is not determined by the ultimate purpose of regulating Indian gaming. Rather, the scope of the NIGC's power is based upon the specific means prescribed by Congress to achieve that ultimate purpose.[5] IGRA sets out in detail the specific means to be employed by the NIGC to carry out its discrete powers to issue orders of temporary closure of gaming activities; levy and collect civil fines; approve tribal ordinances or resolutions; approve management contracts for Class II and Class III gaming;[6] and monitor, inspect, and examine Class II gaming activities.[7]

IGRA grants authority over other aspects of Indian gaming to the Secretary, Indian tribes, and the States. Therefore, it is evident from the plain language of IGRA that, although Congress established the NIGC as a commission for the purpose of regulating Indian gaming, it did not grant the NIGC the power to regulate, interpret, or decide all aspects of Indian gaming or matters related to Indian gaming.

As with the NIGC, it is clear that Congress did not grant the Secretary the power to regulate, interpret, or decide all aspects of Indian gaming. The Secretary has limited authority over those aspects of gaming that are assigned by IGRA to the NIGC, Indian tribes, or the States. Unlike the NIGC, the Secretary has authority for Indian gaming matters and matters related to Indian gaming that are not expressly assigned to any entity under IGRA. This authority is based upon statutes other than IGRA that give the Secretary broad authority to manage matters of Indian affairs and implement the laws governing Indians, and specific authority over Indian lands and tribal governments. Thus, the scope of the Secretary's authority is much broader than that of the NIGC and includes many general matters.

The authority of the NIGC is strictly limited to the discrete powers that are expressly assigned to it by Congress in IGRA. While it may interpret the statute and fill gaps with respect to its specific powers, the NIGC has no general authority over the regulation of Indian gaming based on the ultimate purpose of its authorizing statute. By contrast, the scope of the Secretary's authority extends broadly to most matters of Indian affairs and includes implementing many of the laws governing relations with tribes and individual Indians. Moreover, based on longstanding and specific authority under the Indian Reorganization Act and other generally applicable Indian law, the Secretary has the specific authority and subject matter expertise to decide issues concerning Indian lands and tribal jurisdiction. Thus, it is the Secretary, not the NIGC, who has the implicit authority to interpret any ambiguities and fill any gaps in IGRA, particularly with respect

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[4] 25 U.S.C. § 2702(4).
[5] *See MCI v. AT&T Co.*, 512 U.S. 218, 231 (1994).
[6] 25 U.S.C. § 2705(a).
[7] 25 U.S.C. § 2706(b).

to ambiguities or gaps that concern what constitutes Indian lands and the scope of tribal jurisdiction.

Indian lands opinions are by definition legal opinions that analyze whether lands are eligible for gaming. Indian lands opinions include issues such as whether lands meet the definition of Indian lands; whether a tribe is exercising jurisdiction and governmental authority over those lands; whether gaming is authorized under 25 U.S.C. § 2719; and a legal analysis of 25 C.F.R. Part 292. Resolution of these questions has not been delegated to the NIGC. Moreover, resolution of these issues relies on the particular expertise of the Solicitor's Office regarding overall Indian issues and not just Indian gaming concerns.

I am sending a copy of this letter to all parties copied on your May 19, 2008 opinion.

Sincerely,

David L. Bernhardt
Solicitor

cc: Buford L. Rolin, Tribal Chairman
William Perry, Sonosky, Chambers, Sachse, Endreson, & Perry
Cindy Altimus, Region Director
Troy King, Attorney General, State of Alabama